

IN THE
United States Circuit Court of Appeals
FOR THE SEVENTH CIRCUIT,
OCTOBER TERM, A. D. 1916.

No. 2525

ECONOMY LIGHT AND POWER COMPANY,
A CORPORATION,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

MR. FRANK H. SCOTT,

Counsel for Appellant.

MR. CHARLES F. CLYNE,

Counsel for Appellee.

Appeal from the District Court of the United States for the Northern District
of Illinois, Eastern Division.



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2 Pleas in the District Court of the United States for the Northern District of Illinois, Eastern Division, in Chancery sitting, at the United States Court room, in the City of Chicago, in said District and Division, before the Honorable Kenesaw M. Landis, District Judge of the United States for the Northern District of Illinois, on Friday, the twenty-fifth day of May, being one of the days of the May Term of said Court, begun Monday, the seventh day thereof, in the year of our Lord one thousand nine hundred and seventeen, and of the Independence of the United States of America, the one hundred and forty-first year.

Placita.

Present:

Hon. Kenesaw W. Landis, District Judge, Presiding.
John J. Bradley, United States Marshal for said District and
T. C. MacMillan, Clerk of said Court.

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3 IN THE CIRCUIT COURT OF THE UNITED STATES,
Northern District of Illinois,
Eastern Division.

United States of America,
vs.
Economy Light and Power Company. } 29776.

Be It Remembered, That heretofore to-wit: on the fourteenth day of December, 1909, came the United States of America, by the United States Attorney for the Northern District of Illinois, acting under the direction of the Attorney General of the United States, and filed in the clerk's office of said Court, a certain Bill of Complaint in words and figures following to-wit:

4 IN THE CIRCUIT COURT OF THE UNITED STATES,
For the Eastern Division of the
Northern Judicial District of Illinois.

United States of America
vs.
Economy Light and Power Company. } In Chancery.
No. 29776

To the Judges of the Circuit Court of the United States for the Northern District of Illinois, In Chancery Sitting:

Now Comes the United States of America, by Edwin W. Sims, the United States Attorney for the Northern District of Illinois, acting under the direction of the Attorney General of the United States, and brings this, its bill, against the Economy Light and Power Company, defendant, and thereupon complaining says:

That the defendant, the Economy Light and Power Company, is a corporation duly organized under the laws of the State of Illinois, and that its office and principal place of business are in Chicago, in the County of Cook and State of Illinois;

That said defendant, the Economy Light and Power Company, without the consent of congress and without authority of the legislature of Illinois, and without the approval by the

Chief of Engineers and by the Secretary of War of the location and plans therefor has commenced the construction of a dam in the Desplaines river at a point in said river in Grundy County in the State of Illinois, and within said Northern District of Illinois, and has already constructed a part of said 5 dam; and that the portion of said Desplaines river in which the construction of said dam has been commenced is a navigable water of the United States;

Bill of
Complaint
Dec. 1

That said Desplaines river has its source in the State of Wisconsin, and flows in a southerly direction into the State of Illinois and through the northern portion of said state into said Grundy County in said state, where it unites with the Kankakee river and forms the Illinois river, which last named river flows through a portion of said State of Illinois into the Mississippi river;

That said defendant claims to be the riparian owner of the land along both sides of said Desplaines river at the point where the construction of said dam has been commenced; that its title to said land is based upon mesne conveyances from one Charles E. Boyer; that said Boyer obtained title to said land through deed from the Board of Trustees of the Illinois and Michigan canal, dated October 22, 1860, and conveying to said Boyer certain lands therein described as follows:

"The South fraction of the Northwest quarter (NW $\frac{1}{4}$), and the North fraction of the Southeast quarter (SE $\frac{1}{4}$), and the North fraction of the Northwest quarter (NW $\frac{1}{4}$), and the South fraction of the Southeast quarter (SE $\frac{1}{4}$), of said Section twenty-five (25) in Township thirty-four (34) North, of Range eight (8), East of the Third Principal Meridian, excepting and reserving so much of said tract as is occupied by the canal and its waters, and a strip ninety (90) feet wide on either side of said canal, containing one hundred and ninety-six and sixty-two hundredths (196.62) acres, more or less, said tract being a portion of the land granted by the United States, by Act of March 21, 1827, and the 28th day of August, 1854, to the State of Illinois, to aid said State in opening a canal to connect the waters of the Illinois river with those of Lake Michigan, and by said State granted to the said Board of Trustees of the Illinois and Michigan canal for the purposes set forth in said Act of said State of February 21, 1843:"

that the portion of said Desplaines river in which the construction of said dam has been commenced by said defendant flows through the lands described in said deed to said Boyer;

That by act of congress of March 30, 1822, entitled "An Act

to authorize the State of Illinois to open a canal through the public lands, to connect the Illinois River with Lake Michigan," it was provided that the State of Illinois be authorized to survey and mark, through the public lands of the United States the route of the canal connecting the Illinois river with the southern bend of Lake Michigan; and that ninety feet of land on each side of said canal should be forever reserved from any sale to be made by the United States, except in the cases thereafter provided for, and the use thereof forever vested in the said state for a canal and for no other purpose whatsoever; on condition, however, that if the said state did not survey and direct by law said canal to be opened, and return a complete map thereof to the Treasury Department, within three years from and after the passage of said act; or, if said canal be not completed, suitable for navigation, within twelve years thereafter; or, if said ground should ever cease to be occupied by, and used for, a canal suitable for navigation, the reservation and grant thereby made should be void and of none effect; that it was further provided by said act that said canal when completed, should be and forever remain, a public highway for the use of the Government of the United States, free from any toll or other charge whatever, for any property of the United States or person in their service passing through the same;

That by act of congress of March 2, 1827, entitled, "An Act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," it was provided that there be granted to the State of Illinois, for the purpose of aiding the said state in opening a canal to unite the waters of the Illinois river with those of Lake Michigan, a quantity of land equal to one-half of five sections in width, on each side of the said canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office, under the direction of the President of the United States, from one end of the said canal to the other; and that said land be subject to the disposal of the legislature of the said state for the purpose aforesaid, and no other; and that said canal when completed should be and forever remain a public highway for the use of the Government of the United States, free from any toll or other charge whatever, for any property of the United States or persons in their service passing through the same; and that said canal should be commenced within five years and completed in twenty years, or the state should be bound to pay to the

United States the amount of any lands previously sold, and that the title to purchasers under the state should be valid; that it was further provided by said act that as soon as the route of the said canal should be located and agreed on by the said state it should be the duty of the governor thereof, or such other person or persons as might have been, or should thereafter be, authorized to superintend the construction of said canal, to examine and ascertain the particular section to which said state would be entitled under the provisions of said act, and to report the same to the Secretary of the Treasury of the United States; that said act further provided that the said state, under the authority of the legislature thereof, after the selection should have been so made, should have power to sell and convey the whole, or any part of said land, and to give a title in fee simple therefor, to whomsoever should purchase the whole or any part thereof;

That prior to the passage of said acts of congress above mentioned, to wit, during the year 1821, the United States made a survey of public lands along and adjacent to said Desplaines river, including the portion thereof in which the construction of said above mentioned dam has been commenced, and caused said Desplaines river to be meandered, and fixed and determined upon its said surveys of public lands the meander lines of said river, which said surveys showing said meander lines were made, and have been continuously since the time of said surveys, a part of the public records of said United States relating to the public lands; that pursuant to said acts of congress the route of said canal was laid out by said State of Illinois, and thereafter, to wit, in December, 1829, a map showing said route was filed with the Treasury Department of said United States; that the construction of said Illinois and Michigan canal was commenced in the year 1837, and was completed in the year 1848; that by act of February 26, 1839, entitled "An Act to amend the several laws in relation to the Illinois and Michigan canal," said State of Illinois made provision for the sale and disposal of said lands granted by the United States by said act of March 2, 1827, and therein provided as follows:

"Lands situated upon streams which have been meandered by the surveys of public lands by the United States shall be considered as bounded by the lines of those surveys, and not by the stream;"

8 that in and by said act of 1839 said legislature of the State of Illinois declared it to be its understanding that said grant of March 2, 1827, did not include the land and the river

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909. bed within said meander lines, and that said State of Illinois did not accept any grant of the land and river bed within said meander lines to be disposed of for the purpose specified in said act of March 2, 1827; that there never was any acceptance by said State of Illinois of the land and river bed within said meander lines as a part of said grant under said act of March 2, 1827, and that upon the contrary, upon the surveys of said State of Illinois showing the land accepted by it under said grant of March 2, 1827, for disposal by the state pursuant to said act, it was indicated that the land and river bed within said meander lines, including that portion of the bed of the Desplaines river where said defendant has commenced the construction of the above mentioned dam, was not included in the lands accepted by said State of Illinois to be disposed of pursuant to the terms of said act of March 2, 1827;

That by act of February 21, 1843, entitled "An Act to provide for the completion of the Illinois and Michigan canal, and for payment of the canal debt," the legislature of the State of Illinois created a board known by the style and description of the "Board of Trustees of the Illinois and Michigan canal," and for the purpose of raising a fund for the completion of said Illinois and Michigan canal authorized the governor of said state to negotiate a loan, solely on the credit and pledge of the said canal, its tolls, revenues, and lands, to be granted to said board of trustees; and for the purpose of placing in the hands of said trustees full and ample security for the payment of said loan authorized by said act and the interest thereon, as well as for securing a preference in the payment of such of the canal bonds and other evidence of indebtedness issued by said state for the purpose of aiding in the construction of said Illinois and Michigan canal as might be owned by the subscribers to the said loan the said State of Illinois by said act of February 21, 1843, assumed to grant to said board of trustees of the Illinois and Michigan canal the bed of said Illinois and Michigan canal, and the appurtenances thereto, and all the property, right, title and interest of the state, of, in and to the said canal, with all the hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and also all the remaining lands and lots 9 belonging to the said canal fund, or which thereafter might be given, granted, or donated by the general government to the state, to aid in the construction of the said canal; that said act further authorized said board of trustees to take possession of said canal, lands, and property, and also pro-

vided that none of the lots, lands or water powers so granted to the said trustees should be sold until three months after the completion of said canal; that, pursuant to their authority under said act of February 21, 1843, said board of trustees of the Illinois and Michigan canal, in the year 1846, caused a survey of said lands to be made showing the lands granted by the United States and accepted by the State of Illinois, to be disposed of by said state for the purpose specified in said act of March 2, 1827; that upon said survey so made said meander lines of said Desplaines river as shown by said government survey above mentioned were designated as the boundaries of the lands granted by the United States and accepted by the State of Illinois for disposal under the terms of said act of congress of March 2, 1827; that the sale of said lands by the State of Illinois to said Boyer above mentioned was made in accordance with said survey by said board of trustees of the Illinois and Michigan canal, and that upon said survey the portion of said Desplaines river in which said defendant has commenced the construction of said dam is designated as within said meander lines and is not included among the lands granted by the United States and accepted by the State of Illinois for disposal pursuant to the terms of said act of congress of March 2, 1827. Complainant further charges that said survey of said canal commissioners was made under authority of said State of Illinois, and that the boundaries as shown thereon with respect to the lands granted by the United States and accepted by the State of Illinois for disposal in accordance with the terms of said act of March 2, 1827, were ratified, accepted and acted upon by said State of Illinois in all of its transactions relating to said lands; that under said grant of March 2, 1827, said State of Illinois did not acquire any title to or interest in that portion of the bed of the Desplaines river where said defendant has commenced the construction of said above mentioned dam, and that said Boyer by his said deed from the State of Illinois did not acquire any title to or interest in that part of the bed of said river, and that said defendant has no title to or interest in that portion of the bed of said Desplaines river where
10 it has commenced the construction of said dam above mentioned, and that said portion of said river bed is the property of and is subject to the control of the United States.

Complainant further charges that the construction of said proposed dam by said defendant will obstruct the flow of the water of said Desplaines river and will overflow the lands adjacent to said river, and that the construction of said dam

by said defendant is an unwarranted interference with and injury to the property of said United States, and will result in irreparable injury thereto, for which injury there is no appropriate or adequate remedy at law;

That said Illinois and Michigan canal is, and has been at all times since its completion in 1848, an artificial navigable waterway of the United States connecting Lake Michigan and the Chicago river with the Illinois and the Mississippi rivers; that said canal joins the Chicago river at a point in Cook County, Illinois; that it passes through portions of the counties of Cook and Will, and connects with said Desplaines river at a point in said Will County near and above the City of Joliet; that said canal follows the bed of said Desplaines river for a distance of between one and two miles, and that at that place the channel of the canal forms the channel of said Desplaines river; that said canal then diverges from said Desplaines river and parallels the course of said river and of the Illinois river, and passes through portions of said Will county and of Grundy and LaSalle counties, and connects with said Illinois river at LaSalle in said LaSalle county; that the place at which said defendant has commenced the construction of said above mentioned dam is about fifteen miles below the point at which said Illinois and Michigan canal diverges from said Desplaines river;

That, after the completion of said canal in 1848, a portion of the water flowing through it was taken from Lake Michigan through said Chicago river, and a portion of the water flowing in said canal after it diverges from said Desplaines river was taken and diverted from said Desplaines river;

That by act of the Illinois legislature of February 28, 1839, it was provided that said Desplaines river, from a point where it most nearly connects itself with the Illinois and Michigan canal to its sources within the boundaries of said State of Illinois, was thereby declared to be a navigable stream, and that it should be deemed and held a public highway and should be and remain free, open and unob-
11 structed for the passage of all boats and water crafts of every description; that by the terms of the ordinance of 1787 it was provided that the navigable waters leading to the Mississippi and St. Lawrence rivers, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the confederacy, without tax, impost, or duty therefor;

That by the statute of 1846, ch. 89, sec. 3, admitting Wisconsin into the union as a state, it was enacted that the Mississippi and other rivers bordering on said state, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor; that said portion of said Desplaines river within said State of Wisconsin is a navigable stream; and that by virtue of said ordinance of 1787, said act of the congress and said act of the Illinois legislature last above mentioned, the portions of said Desplaines river covered thereby became and are navigable waters of the United States.

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Complaint
Dec. 1846

Complainant further charges, upon information and belief, that the portion of said Desplaines river between the point at which said Illinois and Michigan canal diverges from said river and its mouth, including the point at which said defendant has commenced the construction of said above mentioned dam, was in its natural condition navigable in fact; that in such natural condition it was capable of use by the public for purposes of navigation, and that by virtue of its connection with the Illinois and Mississippi rivers it formed a highway capable of being used for purposes of interstate and foreign commerce; that the obstructions to the navigability of said river in certain points in said portion of the river arising from shallow places and rapids in the river were capable of being removed and overcome by the improvement of said river, and that pending said improvement said navigable river, irrespective of said shallow places and rapids, is to be deemed an unbroken highway of interstate and foreign commerce, subject to the care and protection of the United States.

Complainant further represents that upon the completion of said Illinois and Michigan canal said portion of said
12 Desplaines river below the point of its connection with said canal by reason of its connection with said canal and the Illinois river formed a part of a continuous highway for interstate and foreign commerce embracing Lake Michigan, the Chicago river, the Illinois and Michigan canal, the Desplaines and Illinois rivers, and the Mississippi river; that by virtue of the connection of said Desplaines river with said other navigable waters of the United States and its relation thereto, said portion of said Desplaines river, without regard to obstructions to navigation at certain places on account of shallow places and rapids, was and is a part of a system

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of navigable waters of the United States, and is to be deemed a navigable water of the United States, subject to the jurisdiction and control of the federal government.

Complainant further represents that by act of May 29, 1889, entitled, "An Act to create sanitary districts, and to remove obstructions in the Desplaines and Illinois rivers," provision was made for the construction under authority of the State of Illinois of a canal connecting the Chicago river with said Desplaines river, through which a large quantity of water was to be diverted from Lake Michigan into said Desplaines river; that it was provided by said act that the channel to be constructed under the provisions thereof should be constructed of sufficient size and capacity to produce and maintain at all times a continuous flow of not less than 300,000 cubic feet of water per minute, and to be of a depth of not less than fourteen feet and with a current not exceeding three miles per hour; that if any portion of any such channel should be cut through a territory with a rocky stratum, where such rocky stratum is above a grade sufficient to produce a depth of water from Lake Michigan of not less than eighteen feet, such portion of said channel should have double the flowing capacity above provided for, and a width of not less than one hundred and sixty feet at the bottom, capable of producing a depth of not less than eighteen feet of water;

That it was further provided by said act that if the population of the district created by said act, draining into such channel, shall at any time exceed 1,500,000, such channel shall be made and kept of such size and in such condition that it will produce and maintain at all times a continuous flow of not less than 20,000 cubic feet of water per minute for each 100,000 of the population of such district, at a current of not more than three miles per hour, and if at any time

13 the general government shall improve the Desplaines or Illinois rivers, so that the same shall be capable of receiving a flow of 600,000 cubic feet of water per minute, or more, from said channel, and shall provide for the payment of all damages which any extra flow above 300,000 cubic feet of water per minute from such channel may cause to private property so as to save harmless the said district from all liability therefrom, then such sanitary district shall within one year thereafter, enlarge the entire channel leading into said Desplaines or Illinois rivers from said district to a sufficient size and capacity to produce and maintain a continuous flow throughout the same of not less than 600,000 cubic feet of water per minute, with a current of not more than three miles

per hour, and such channel shall be constructed upon such grade as to be capable of producing a depth of water not less than eighteen feet throughout said channel, and shall have a width of not less than one hundred and sixty feet at the bottom; that, in case a channel is constructed in the Desplaines river as contemplated in said act, it shall be carried down the slope between Lockport and Joliet to the pool commonly known as the upper basin of sufficient width and depth to carry off the water the channel shall bring down from above;

That it is further provided in said act that the district constructing a channel to carry water from Lake Michigan of any amount authorized by said act, may correct, modify and remove obstructions in the Desplaines and Illinois rivers wherever it shall be necessary so to do to prevent overflow or damage along said river, and shall remove the dams at Henry and Copperas Creek in the Illinois river, before any water shall be turned into the said channel; and it is further provided by said act that whenever the board of trustees of said sanitary district shall pass an ordinance for the making of any improvement which such district is authorized to make, the making of which will require that private property should be taken or damaged, such district may cause compensation therefor to be ascertained and condemn and acquire possession thereof in the same manner, as nearly as may be, as is provided in an act entitled, "An Act to provide for the exercise of the right of eminent domain," approved April 10, 1872, provided, however, that proceedings to ascertain the compensation to be paid for taking or damaging private property should in all cases be instituted in the county where the property sought to be taken or damaged is situated; that

14 it is further provided in said act that said sanitary district constructing said canal shall be liable for all damage to real estate within or without such district which shall be overflowed or otherwise damaged by reason of the construction, enlargement or use of any channel, ditch drain, outlet or other improvement under the provisions of said act, and that actions to recover such damages may be brought in the county where such real estate is situate or in the county in which such sanitary district is located, at the option of the party claiming to be injured; that it is further provided in said act that when it shall be necessary, in making any improvements that said district is authorized by said act to make, to enter upon any public property, or property held for public use, such district shall have the power to do so, and

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complaint,
Dec. 14,

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may acquire the necessary right of way over such property held for public use in the same manner as is above provided for acquiring private property, and may enter upon, use, widen, deepen and improve any navigable or other waters, waterways, canal or lake; that it is further provided by said act that when said channel of said sanitary district shall be completed and the water turned therein to the amount of 300,000 cubic feet of water per minute, the same is thereby declared a navigable stream, and that whenever the general government shall improve the Desplaines and Illinois rivers for navigation to connect with said channel, said general government shall have full control over the same for navigation purposes, but not to interfere with its control for sanitary or drainage purposes;

That pursuant to the provisions of said act of March 29, 1889, and under the authority of said State of Illinois, the Sanitary District of Chicago, created pursuant to the provisions of said act, did construct a canal connecting the Chicago river with said Desplaines river; that said canal connects with said Desplaines river at a point about one and one-third miles above the point at which the Illinois and Michigan canal connects with said river; that upon the completion of said sanitary district canal, and prior to the commencement of the construction by the defendant of the dam in the Desplaines river hereinabove mentioned, to wit, in the year 1900, said Sanitary District of Chicago, pursuant to its said authority from the State of Illinois, did divert through said canal from Lake Michigan into said Desplaines river, water to the amount of about 300,000 cubic feet per minute, and that continually since

the opening of said sanitary district canal there has been
15 diverted from Lake Michigan through said canal into said

Desplaines river, at a point above that at which said defendant has commenced construction of said above mentioned dam, a quantity of water amounting to about 300,000 cubic feet per minute; that said sanitary district canal, so constructed under authority of the State of Illinois, is, and has been since the opening of said canal in 1900, water navigable in fact, and is, and has been since said time, a part of the navigable waters of the United States, and subject to the jurisdiction and control of the federal government; that in connection with the construction of said sanitary district canal, and in creating the system of waterways resulting from the construction of said canal, said State of Illinois has caused the quantity of water flowing through said Desplaines river below the point at which it connects with said canal, to be largely increased,

and that said portion of said river has been continuously, since the opening of said canal, and is now water navigable in fact and a part of the navigable waters of the United States and subject to the jurisdiction and control of the federal government; that since said State of Illinois has thus artificially increased the quantity of water flowing through said portion of said Desplaines river, the only substantial obstructions to the navigability of said river are certain rapids between the portion of said river known as the upper basin, namely, the portion of said river in which it follows the channel of the Illinois and Michigan canal, and the portion of said river known as Lake Joliet, and certain other rapids at Treat's Island and Dresden Heights in said river; that, with the exception of the difficulties arising on account of said rapids said river has been, since the opening of said sanitary district canal, and now is, capable of being navigated for the purposes of commerce, and that difficulties arising on account of said rapids above mentioned are capable of being overcome through the improvement of said river by locks, canals and dams.

Bill of complaint,
Dec. 14, 1887

Complainant further charges that in connection with, and as a result of, the construction of said sanitary district canal and the diversion of said water from Lake Michigan, said Sanitary District of Chicago, acting under authority of said State of Illinois, has largely increased the navigability of said Desplaines river, and that continuously since the opening of said canal there has been and is in said portion of said Des-

plaines river, below the point at which it connects with
16 said canal, a body of water navigable in fact, and which
by virtue of its connection with other navigable waters is

to be deemed a part of the navigable waters of the United States, and subject to the jurisdiction and control of said United States; that the control of said United States over said body of navigable water in the exercise of its power to regulate commerce, exists irrespective of controversies between said State of Illinois and property owners along said Desplaines river as to compensation for damages alleged to have been inflicted through the diversion of said water from Lake Michigan into said Desplaines river; and that said power of control of said United States over said body of water is in no respect diminished or taken away by the failure of said State of Illinois or its agency, said Sanitary District of Chicago, to compensate said property owners along said Desplaines river for property rights which have been damaged or lost

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1909.

by reason of said diversion of water from Lake Michigan into said Desplaines river.

Complainant further represents that by section 9 of the river and harbor appropriation act of March 3, 1899, ch. 425, it is provided:

"That it shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; Provided, That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced;"

That in the year 1907 said defendant commenced the construction of said dam in said Desplaines river, and has already constructed a portion thereof; that said defendant has never obtained the consent of congress to the building of said dam, nor have the location and plans for the construction of said dam been approved by the Chief of Engineers and by

the Secretary of War, as required by said act; and that,
17 on the contrary, said defendant asserts and maintains that said Desplaines river is not a navigable river or a navigable water of the United States, and that the authority and permission provided by said act of March 3, 1899, is not required for the construction of said dam; that said defendant has refused, and refuses, to remove the portion of said dam already constructed, and threatens to, and will, complete the construction of said dam unless prevented by the injunction of this court. Complainant further charges that the portion of said dam already constructed is a structure erected in violation of the provisions of said act of March 3, 1899, and that if the construction of said dam is completed by said defendant said structure will be a permanent obstruction in said river, and will irreparably injure and damage the rights and property of the United States relating to and connected with the system of navigable waters hereinabove mentioned.

In consideration whereof, and inasmuch as adequate rem-

edy in the premises can only be obtained in this court, the United States of America prays this court to order, adjudge and decree that said Desplaines river is a navigable river, and one of the navigable waters of the United States; that the portion of said dam which has been constructed by said defendant as hereinabove set forth, is a structure erected in violation of the provisions of section 9 of the Act of March 3, 1899, and that its removal should be enforced by the injunction of this court; that the threatened completion of said dam by said defendant without the permission and authority required by said act will be contrary to the provisions of said act, and will result in irreparable injury and damage to the property and rights of the United States, and that said defendant, its officers and agents, and all persons acting for it, should be enjoined perpetually from placing any further obstruction in said Desplaines river, and from doing any other act or performing any other work in connection with the erection or construction of said dam.

To the end, therefore, that the United States of America may obtain the relief to which it is justly entitled in the premises, may it please Your Honors to grant to it the writ of subpoena directed to said defendant, the Economy Light and Power Company, commanding it to appear herein and answer, but not under oath (answer under oath being hereby expressly waived), the allegations contained in the foregoing

bill of complaint, and abide by and perform such order
18 and decree as the court may make in the premises and upon hearing hereof to permanently enjoin the defendant as hereinbefore prayed, and pending the final hearing of this cause, cause a temporary restraining order to issue enjoining said defendant, its officers, agents and servants, and all persons acting for it, as hereinbefore prayed.

GEORGE W. WICKERSHAM,

Attorney General of the United States.

EDWIN W. SIMS,

*United States Attorney for the Northern
District of Illinois.*

JAMES H. WILKERSON,

Special Assistant United States Attorney.

Bill of com-
plaint, III
Dec. 14/7

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Dec. 14, 1909.

19 United States of America,
Northern District of Illinois, } ss.
Eastern Division.

Edwin W. Sims, having been first duly sworn, says that he is United States Attorney for the Northern District of Illinois; that he has read the foregoing bill of complaint and knows the contents thereof; that the same is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he believes them to be true. He further states that he is authorized to sign said bill of complaint for the United States of America, the complainant therein, by the Attorney General of the United States.

EDWIN W. SIMS,

Subscribed in my presence and sworn to before me this 14th day of December, A. D. 1909.

WILLIAM A. SMALL,
Notary Public.

(Seal)

(Endorsed) Filed Dec. 14, 1909. H. S. Stoddard, Clerk.

20 And afterwards to-wit: on the twenty-eight day of February, 1910, came the defendant in said entitled cause by its solicitors and filed in the clerk's office of said court, its certain Answer in words and figures following towit:

21

IN THE CIRCUIT COURT OF THE UNITED STATES

Answer, n
Feb. 28,

Northern District of Illinois,

Eastern Division.

United States of America

vs.

}

Economy Light & Power Company. }

ANSWER OF THE ECONOMY LIGHT AND POWER COMPANY, DEFENDANT, TO THE BILL OF COMPLAINT OF THE UNITED STATES OF AMERICA, COMPLAINANT:

This defendant, reserving to itself all right of exception to the said Bill of Complaint, and reserving to itself the same rights under this answer as if it had demurred or pleaded to said Bill of Complaint for the matters and things herein set forth, says:

First. That said bill is multifarious, in that it joins a cause of action which affects only the alleged property rights of the United States, in and to the land and river bed within the meander lines of the Desplaines River, and in which the public have no right or interest, with a cause of action wherein the United States, in its sovereign political capacity, is seeking to enforce the alleged rights of the public in and to such stream as a navigable water of the United States, a matter in which said United States has, and claims, no property rights.

Second. That the allegations of said bill as to the ownership by complainant of the lands and river-bed within the meander lines of said Desplaines River, do not state a cause of action cognizable in a court of equity.

22 Third. That said bill, while claiming that the title to the lands and river-bed within the meander lines of said Desplaines River is in complainant, shows that there is an adverse claim of ownership of said lands by the defendant and does not show that the title of complainant to said lands has been determined in an action at law.

Fourth. That said bill, while alleging that the Desplaines River is a navigable stream, claims that the title of the United States in and to the land in the bed of said stream in that portion of said stream in Section 25, Township 34 North

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of Range 8 East of the Third Principal Meridian, in Grundy County, Illinois, in which defendant is seeking to construct its dam, never passed to the State of Illinois.

Fifth. That said bill alleges that by reason of the additional water discharged into it from the channel of the Sanitary District of Chicago, the Desplaines River has become a navigable stream and claims relief on that ground.

Sixth. That said bill alleges that by virtue of the ordinance of 1787, said Desplaines River became navigable waters of the United States.

Seventh. That said bill alleges that by virtue of the Act of the Legislature of Illinois of February 28, 1839, the portion of said Desplaines River therein referred to became navigable waters of the United States.

Eighth. That said bill alleges that by virtue of the Act of Congress admitting Wisconsin into the Union, the portion of said Desplaines River situated within the State of Wisconsin became navigable waters of the United States.

Ninth. That said bill does not allege that the dam,
23 the construction of which it seeks to restrain, will interfere with commercial navigation upon said river.

Tenth. That said bill does not allege that there is any commercial navigation upon said river which will be interfered with or obstructed by the completion or maintenance of said dam.

Eleventh. That said bill shows that defendant is in possession of the land and river-bed, within the meander line of said Desplaines River in said Section 25, Township 34, Range 8 East of the Third Principal Meridian, in Grundy County, Illinois, under bona fide claim of title thereto, deduced from the State of Illinois, and seeks to divest defendant of its title thereto, and this defendant, by virtue of the seventh amendment to the constitution of the United States and Section 5 of Article II of the constitution of the State of Illinois, has a right to have its title determined in a court of law by a jury.

Twelfth. That by virtue of Section 35 of Chapter 45 of the Revised Statutes of the State of Illinois, this defendant is entitled to have its claim of title determined in two separate trials before two separate juries.

And defendant prays the same benefit and advantage of the above matters as if it had specifically pleaded or demurred to said bill therefor.

This defendant not waiving all or any of said grounds of demurrer, but insisting and relying upon each of them, further answering, says:

That it admits that it is a corporation duly organized under the laws of the State of Illinois, but denies that its office and principal place of business is in Chicago, in the County of Cook.

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Feb. 11

Further answering, defendant admits that without the consent of Congress, and without the authority of the 24 Legislature of Illinois, and without the approval by the chief of engineers or the secretary of war (except as hereinafter set out) of the location and plans therefor, it has commenced the construction of a dam in the Desplaines River at a point in said river in Grundy County, in the State of Illinois, and within said Northern District of Illinois, and has already constructed a part of said dam; but denies that the portion of said Desplaines River in which the construction of said dam has been commenced is navigable water of the United States, or that it is a navigable water.

Defendant admits that said Desplaines River has its source in the State of Wisconsin and flows in a southerly direction into the State of Illinois, and through the northern portion of said State, into Grundy County, in said State, where it unites with the Kankakee River and forms the Illinois River, and that last named river flows through a portion of the State of Illinois into the Mississippi River, as is alleged in said Bill of Complaint.

Defendant admits that it claims to be the riparian owner of land along both sides of the said Desplaines River, at the point where the construction of said dam has been commenced, and admits that its title to said land is based upon mesne conveyances from one Charles E. Boyer, and that said Boyer obtained title to said land through a deed from the Board of Trustees of the Illinois and Michigan Canal, dated October 22, 1860, and conveying to said Boyer certain land therein described, substantially as set forth in said Bill of Complaint, and that the portion of said Desplaines River in which the construction of said dam has been commenced by this defendant flows through the land described in said deed to Boyer.

25 This defendant admits the adoption by Congress of the Act of March 30, 1822, entitled "An Act to authorize the State of Illinois to open a canal through the public lands, to connect the Illinois River with Lake Michigan," but for the provisions of said Act it refers to 3 U. S. Stats, at large, page 269, et seq., where said act in full and at length appears. But this defendant avers that the State of Illinois did not comply with the provisions of said act, and that said act, by the terms thereof, became "void and of none effect."

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This defendant admits the adoption by Congress of the Act of March 2, 1827, entitled "An Act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," for the provisions of which act it refers to 4 U. S. Stats. at large, page 234, et seq., where said act in full and at length appears.

Defendant admits that by said act of 1827 there was granted to said State of Illinois, for the purpose of aiding the State in opening a canal to unite the waters of the Illinois River with those of Lake Michigan, a quantity of land equal to one-half of five sections in width on each side of said canal. And defendant avers that it was provided in such act that such land should be subject to the disposal of the Legislature of the State, for the purpose aforesaid and no other, that so soon as the route of said canal should be located and agreed upon by said State, it should be the duty of the Governor thereof, or of such other person or persons as should have been authorized to superintend the construction of said canal, to examine and ascertain the particular sections to which

the State would be entitled under the provisions of said act and report the same to the Secretary of the Treasury of the United States, that after the selection of such lands should have been so made, the State under the authority of its Legislature, should "have power to sell and convey the whole or any part of said lands, and give a title in fee simple therefor, to whomsoever should purchase the whole or any part thereof."

And defendant avers that on, to-wit, the 22nd day of January, 1829, the Legislature of the State of Illinois passed an act authorizing the Governor of the State, by and with the advice of the Senate, to appoint three commissioners, whose duty it should be, among other things, to superintend the construction of said canal and to select the alternate sections of land granted to said State as aforesaid and that pursuant to such act, the Governor of the State of Illinois, by and with the consent of the Senate thereof, appointed commissioners of the Illinois and Michigan Canal, for the purposes and with the powers in said act provided; that pursuant to said act of Congress of December 2, 1827, and said act of the Legislature of Illinois of January 22, 1829, the route of said canal was laid out; and that in December, 1829, the said Canal Commissioners did select each alternate section having an odd number along the route of said canal. And defendant admits that in December, 1829, a map showing the route of said canal

and the land so selected by the Canal Commissioners was filed with the Treasury Department of the United States. And defendant avers that by virtue of said act of Congress of March 2, 1827, and the act of the Legislature of the State of Illinois of January 22, 1829, and the location of the route of the Illinois and Michigan Canal, and the selection by said 27 commissioners of the Illinois and Michigan Canal of lands thereunder, each alternate section having an odd number along the route of said canal, including the land and river bed within the meander lines of said Desplaines River in said Section 25 vested in the said State of Illinois, immediately upon the filing of said map showing the route of said canal, and that thereupon said state, under authority of its Legislature, had full power to sell, convey and give title to any and all of said lands, including the bed of said stream, in said Section 25.

This defendant admits that prior to the passage of said act of Congress above mentioned, to-wit, during the year 1821, the United States made a survey of public lands along and adjacent to the said Desplaines River, including the portion thereof in which the construction of said above mentioned dam has been commenced. but denies that it caused said Desplaines River to be meandered, or fixed and determined upon its said survey of public lands the meander lines of said river, or that such surveys showing said meander lines were made, or have been continuously since the time of said surveys, a part of the public records of said United States relating to the public lands.

Defendant admits that the construction of said Illinois & Michigan Canal was commenced in the year 1837, and was completed in the year 1848; admits the adoption by the legislature of the State of Illinois of the Act of February 26, 1839, entitled "An Act to amend the several laws in relation to the Illinois & Michigan Canal," and for the provisions of said act it refers to the laws of Illinois of 1839, page 177, et seq., where said act in full and at length appears. Defendant denies that it was provided in said act that "lands situated upon streams which have been meandered by the sur- 28 veys of public lands by the United States shall be considered as bounded by the lines of those surveys, and not by the stream," but avers that it was provided in Section 2 that in all sales of lands and lots under the provisions of said act certain conditions should be annexed, and should compose a part of the contract, which conditions included the provision hereinabove last quoted. Defendant denies that

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in or by said act of 1839 the legislature of the State of Illinois declared it to be its understanding that said grant of March 2, 1827, did not include the land and the river bed within said meander lines, and denies that said State of Illinois did not accept any grant of land and river bed within said meander lines to be disposed of for the purpose specified in said act of March 2, 1827, and denies that there never was any acceptance by said State of Illinois of the land and river bed within said meander lines as a part of said grant under said act of March 2, 1827, and denies that upon the surveys of said State of Illinois, showing the land accepted by it under said grant of March 2, 1827, for disposal by said state pursuant to said act, it was indicated that the land and river bed within said meander lines, including that portion of the bed of the Desplaines River where this defendant has commenced the construction of its said dam, was not included in the lands accepted by said State of Illinois, to be disposed of pursuant to the terms of said act of March 2, 1827, but, on the contrary thereof, this defendant avers that the said State of Illinois has at all times insisted and declared, and does now insist and declare, that by the said grant of March 2, 1827, and the selection by the Canal Commissioners of each alternate section under said grant, and the filing of said map 29 with the Treasurer of the United States, the title to the land and the river bed within the said meander lines passed from the said United States to the said State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan, as set forth in said act.

Defendant avers that if said Desplaines River is a navigable stream, as alleged in said bill of complaint, which defendant denies, then the title to the bed of said stream passed from the United States to the State of Illinois upon the admission of said State into the Union in 1818.

Defendant admits the adoption by the legislature of the State of Illinois of the act of February 21, 1843, entitled "An Act to provide for the completion of the Illinois & Michigan Canal, and for the payment of the canal debt," and for the provisions thereof defendant refers to the laws of Illinois of 1843, page 54, et seq., where said act in full and at length appears. And defendant avers that said act authorized said Board of Trustees to take possession of said canal lands, property and assets granted to them by said act and to proceed to complete said canal; and this defendant avers that the commissioners appointed pursuant to said act did take

possession of said canal, lands, property and assets, including the lands within the meander lines and the bed of said river in said Section 25, and after the completion of said canal in 1848 proceeded to sell the lands in payment of said canal debt, and avers that under and by virtue of said act of February 21, 1843, the said Board of Trustees sold and conveyed to defendant's predecessor in title, Charles E. Boyer, the lands in said Section 25, including the lands within the meander lines and in the bed of said river whereon defendant is constructing its said dam.

- 30 But defendant denies that pursuant to authority under said act of February 21, 1843, said Board of Trustees of the Illinois & Michigan Canal, in the year 1846, caused a survey of said lands to be made, showing the lands granted by the United States and accepted by the State of Illinois, to be disposed of by said State for the purpose specified in said act of March 2, 1827, and denies that upon said alleged survey the meander lines of said Desplaines River, as alleged to have been shown by said government survey mentioned in said bill of complaint were designated as the boundaries of lands granted by the United States and accepted by the State of Illinois for disposal under the terms of said act of Congress of March 2, 1827, and avers that said Trustees had no power to limit by survey or otherwise the quantity of land granted to or accept by said State of Illinois under said act of Congress of March 2, 1827, or the quantity of land granted to them by said act of February 21, 1843, and denies that the sale of said lands by said State of Illinois to said Boyer, this defendant's predecessor in title, was made in accordance with said alleged survey of said Board of Trustees of said Illinois & Michigan Canal, and denies that upon said survey the portion of said Desplaines River in which this defendant has commenced the construction of said dam, is designated as within said meander lines, or that it is not included among the lands granted by the United States and accepted by the State of Illinois for disposal, pursuant to said act of Congress of March 2, 1827; denies that the alleged survey of said Board of Trustees was made under authority of the State of Illinois, or that the boundaries, as alleged to have been shown thereon with respect to the lands granted by the United States
- 31 and accepted by the State of Illinois, for disposal in accordance with the terms of said act of March 2, 1827, were ratified, accepted or acted upon by said State of Illinois in all or any of its transactions relating to said lands, and denies that under said grant of March 2, 1827, said State of

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Illinois did not acquire any title to or interest in that portion of the bed of the Desplaines River where this defendant has commenced the construction of the dam mentioned in said complaint, or that said Boyer, by said deed from the said Board of Trustees of the Illinois & Michigan Canal, did not acquire any title to or interest in that part of the bed of said river, and denies that this defendant has no title to or interest in that portion of the bed of said Desplaines River where it has commenced the construction of its dam above mentioned, and denies that said portion of said river bed is the property of, or is subject to the control of, the United States. And defendant avers that it and its predecessors in title have been in undisturbed and peaceable possession of the land and river bed within the meander lines of said Desplaines River, in said Section 25, for over fifty years under bona fide claim of title thereto; and that the claim of the United States thereto is stale; and that the said United States ought not at this day to be heard in a court of equity to claim title thereto.

This defendant admits that the construction of its said dam will obstruct the flow of the water of the said Desplaines River to some extent and will overflow the lands adjacent to said river, but it denies that construction of said dam by defendant is an unwarranted interference with or injury to the property of said United States, or that it will result in irreparable, or any, injury thereto, but, on the contrary 32 thereof, defendant alleges that all of the land along said river which will be overflowed by the construction of said dam belongs to this defendant, and that no injury will result to any property of the United States by the construction of said dam.

Defendant admits that the Illinois & Michigan Canal is and has been, since its completion in 1848, an artificial navigable waterway connecting the Chicago River with the Illinois River, but denies that said canal is a navigable waterway of the United States; admits that said canal passes through portions of the counties of Cook and Will, and connects with said Desplaines River at a point in Will County near and above the City of Joliet; that said canal follows the bed of said Desplaines River for a distance of between one and two miles, and that at that place the channel of the canal and the channel of the river occupy the same space, and that said canal then diverges from said Desplaines River and parallels the course of said river and of the Illinois River, and passes through portions of Will, Grundy and La Salle counties, and connects with the said Illinois River at La Salle, in La Salle

County; that the place at which defendant has commenced the construction of its dam is about fifteen miles below the point at which the Illinois & Michigan Canal diverges from said Desplaines River.

Answer,
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Defendant admits that after the completion of the canal in 1848, a portion of the water flowing through it was taken from Lake Michigan, through said Chicago River, and that a portion of the water flowing in said canal after it diverges from said Desplaines River was taken and diverted from the Desplaines River.

Defendant admits the adoption by the legislature of the State of Illinois of the act of February 28, 1839, mentioned in said bill of complaint, but for the provisions of said act it refers to the laws of 1839 of the State of Illinois, page 208, where said act in full and at length appears. But defendant avers that the point at which it is building its said dam is not in that part of said Desplaines River referred to in the said act, and that it is not competent for the State of Illinois to create a navigable stream by a statutory declaration of navigability.

Defendant admits that it was provided in the ordinance of 1787 that the navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same should be common highways, and forever free as well to the inhabitants of said territory as to the citizens of the United States and those of any other states that might be admitted into the confederacy, without any tax, imposed or duty therefor, but defendant avers that upon the admission of Illinois into the Union as a state in 1818, that provision of the ordinance of 1787 cease to have any force or effect within said State.

Defendant denies that the provisions of the statute of 1846, page 89, section 3, admitting Wisconsin into the Union as a state, applies to said Desplaines River, and denies that the portion of the Desplaines River within the said State of Wisconsin, or that portion thereof within the State of Illinois ever were, or now are, navigable, or that said Desplaines River ever was or now is a navigable water of the United States, and denies that said ordinance of 1787, or said act of Congress admitting Wisconsin into the Union, or the said act of the Illinois legislature referred to in said bill of complaint, or all of them, had the effect of making said Desplaines River or any portion thereof navigable waters or navigable waters of the United States, or in any wise affected the char-

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8, 1910.

acter of said stream or the rights of riparian owner thereon.

34 This defendant denies that the portion of said Desplaines River between the point at which said Illinois and Michigan Canal diverges from said river and its mouth, including the point at which this defendant has commenced the construction of its said dam, was in its natural condition navigable in fact; denies that in such natural condition it was capable of use, or ever was used, by the public for purposes of navigation; denies that by virtue of its connection with the Illinois and Mississippi Rivers it formed a highway capable of being used for purposes of interstate or foreign commerce; admits that the obstructions to the navigability of said river arising from shallow places and rapids in this river, are capable of being removed and overcome by the improvement of said river; but avers that such obstructions can only be removed or overcome by the construction of dams and channels in said river of such extent and nature as to entirely change the character of said river, and create a navigable stream where none now exists; and denies that pending such improvements, said river, irrespective of such shallow places and rapids, is to be deemed an unbroken highway of interstate or foreign commerce or of intrastate commerce, or that it is subject to the care and protection of the United States.

Defendant denies that upon the completion of said Illinois and Michigan Canal, said portion of said Desplaines River below the point of its connection with said canal, by reason of its connection with said canal and the Illinois River, formed a part of a continuous highway for interstate or foreign commerce, embracing Lake Michigan, the Chicago River, the Illinois and Michigan Canal, the Desplaines and Illinois Rivers, and the Mississippi River, or that by virtue of the

35 connection of said Desplaines River with said navigable waters of the United States, or its relation thereto, said portion of the Desplaines River, without regard to obstructions to navigation at certain places, or on account of shallow places and rapids, was or is a part of a system of navigable waters of the United States, or is to be deemed a navigable water or navigable water of the United States or subject to the jurisdiction and control of the Federal Government.

But, on the contrary, defendant avers that the said Desplaines River in its original or natural state or condition was not, and that it is not now, a navigable stream and was not, and is not, capable of being navigated for purposes of com-

merce, and that said stream has never been used for purposes of useful or commercial navigation.

Defendant avers that the United States has during a period of over one hundred years treated said Desplaines River as a non-navigable stream; that it has several times had said stream surveyed for the purpose of ascertaining the possibility of creating a navigable channel therein but that the reports of engineers making said surveys have shown that said stream was not a navigable stream; and that it has, without protest, permitted dams and bridges to be constructed in, over and across, said stream from the earliest day down to the present time without its consent, and has in fact never exercised or attempted to exercise any jurisdiction or control over said stream or any part thereof.

Defendant further avers that one Charles A. Munroe and associates, during the year 1904, acquired by purchase from the owners thereof, some 1,800 acres of land lying on both sides of the Desplaines River in Will and Grundy Counties, the ownership of which gave to the said Munroe and associates the right to construct a dam at the mouth of the Desplaines River.

Defendant avers that before the beginning of the construction of its said dam, and in order that said dam might be located at such a point as would contribute to a waterway, if one should ever be constructed in said stream, said Charles A. Munroe submitted the plan of said proposed dam to the War Department of the United States and requested that said Department would give some expression of opinion as to whether or not the plans submitted would be in harmony with the work of improvement proposed—but not then, nor at any time thereafter determined on—by the United States Government, to-wit: the construction of a navigable waterway from Lockport, Illinois, to St. Louis, Missouri, via the Desplaines, Illinois and Mississippi Rivers; and that thereupon the Chief of Engineers of the United States Army referred the matter to Lieutenant-Colonel W. H. Bixby of the Corps of Engineers of the United States Army in charge of the district in which said proposed work was to be constructed, to examine said plans and said proposed work and to report his recommendations thereon; that thereupon the said Bixby reported to the Chief of Engineers of the United States Army as follows:

Answer, filed
Feb. 28, 1905

of
Bixby,
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1906.

United States Engineer Office,
508 Federal Building,

Chicago, Ill., March 27, 1906.

Brig. Gen. A. Mackenzie,
Chief of Engineers, U. S. Army,
Washington, D. C.

General:

1. In reply to Department letter (E. D. 58726) dated March 16, 1906, as to the proposed plans of a water power company for a dam across the Desplaines river, Ill., just above its mouth, which have been verbally and informally presented to your office by the Hon. H. M. Snapp and the water power representatives, I have herewith to submit report as follows:
2. The dam in question is that proposed by Chas. A. Munroe, of Chicago, Ill., as explained by his letter to this office under date of March 20, 1906, with inclosures (copies herewith—2 letters, 3 blueprints), (5 incls.).
3. The Desplaines River, so far as now known to this office, has never yet been considered a navigable stream of the United States. It is therefore apparently as yet subject only to such jurisdiction as applies to all other unnavigable streams and not subject to the provisions of Section 9-13, Act of March 3, 1899, or to other similar U. S. legislation.
4. The agents of the water power company in question, informally claim to have secured possession of all the land on each bank of the river necessary to allow for construction of the dam and of its accessories, and to protect themselves from all future claims for over-flowage created thereby, so far as any existing known rights are concerned; and they likewise claim that there is no existing State law, or United States law which prohibits their legally going ahead with their proposed construction and that no special law is needed therefor. They admit, however, that in some minor matters, they still lack necessary authority from the local Board of Supervisors, to condemn certain properties which they still wish to acquire in order to facilitate or simplify their future work (such permission, however, not being absolutely essential to such work) and they state that the Board of Supervisors are willing to grant such authority as soon as it is evident that the proposed power dam construction will not interfere with the future development of the river for navigation purposes.
5. The water power company agents likewise state that

Report of
W. H. H.
dated Mar
27, 1906.

38 their object in bringing the matter up before the War Department at present, is to make evident that the proposed dam construction not only does not conflict with any existing U. S. law, but also will assist rather than injure the possible future navigation of the Desplaines and Illinois Rivers, should the improvement of such rivers ever be authorized by Congress in the manner proposed by the last Board Report of August 26, 1905, upon the feasibility and cost of a navigable waterway from Lockport, Ill., to St. Louis, Mo., via the Desplaines, Illinois, and Mississippi Rivers (House Document No. 263, 59th Congress, 1st Session); and they desire to secure from the War Department some expression of opinion, informal or otherwise, so far as it can properly be given, that will allow them to assure all inquiries that the War Department so understands the situation and is making no objection to such prompt progress of the work as is necessary to a business enterprise of its magnitude and importance.

6. Paragraph 17 of the Board Report of August 26, 1905, above referred to, specially stated that the plan submitted by the Board was 'not designed to develop water power, but there will probably be no difficulty in modifying it so as to conform to such development if those who are to benefit thereby will co-operate with the Government. They should pay the cost of the dams, and the damage from flowage, which is no more than they would be compelled to do if the Government made no improvement.' The plans herewith submitted by Mr. Munroe show plainly a proposed co-operation such as that described in the above Board Report, offered in such manner as not only to pay the cost of this power dam, and to protect the United States against flowage damage, but also to lessen by one the number of locks and dams necessary for future navigation and to otherwise save both time and money (\$142,385 in first cost and \$4,000 annually thereafter for maintenance and operation) to the United States, in case Congress should finally decide to undertake the improvement covered by the August 26, 1905, Board Report, or to otherwise make this river navigable in this neighborhood. All information, so far as received by this office, appears to substantiate the statements of Mr. Munroe, as described above; and I consider that his proposition should be encouraged and that he should receive from the War Department whatever expression of favorable consideration may be proper and allowable under such circumstances.

7. I have carefully considered the question of this power

of
H. Bixby,
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dam project and have talked it over at intervals with Mr. Woermann, while he was Assistant Engineer in local charge of the Illinois River survey under this office before he had been employed by Mr. Munroe, as well as since that time, and have discussed the matter also with Mr. Munroe; and I believe that the provisos of the next paragraph below are fair and advantageous to both sides, and will leave to the future only the question of regulating pool levels so as to avoid a conflict between depths of water needed for navigation and heads of water needed for power purposes, and so as to divide up the river water between the two according to such rights as may exist when the river shall become a navigable water (which it appears not be at present) and when the United States shall decide to give up the use of the canal and to assume the improvement of the river. Until such time, I do not see how the War Department can assume any definite jurisdiction of the Desplaines River or make any definite demands upon any water-power company already organized for the use of this river. It is my present understanding that these provisos will be accepted by Mr. Munroe.

8. I have therefore to recommend that the Hon. H. M. Snapp and Mr. Charles A. Munroe be informed that the War Department will waive any and all objections which it may have to the progress of such water power dam construction as proposed by Mr. Munroe's letter of March 20, 1906, and its inclosures, provided that he, on the part of the power dam owners, agrees

(a) that he will construct and maintain in good repair, just above the mouth of the Desplaines River, in location
40 as approximately shown on the blue prints, a dam and spillway sufficient to hold the water surface of its upper pool at a height equal to the present mean level of Lake Joliet (taken at 512.0 feet, Memphis datum); and later whenever Congress shall have ordered the improvement of the Desplaines River for navigation purposes, will raise this dam 3.0 feet higher (giving pool level of 515.0 feet, Memphis datum) if the War Department shall so order; and will grant the United States the use of such pool so far as needed for navigation.

(b) that he will assume the cost of, and protect the United States from, claims for all flowage damages caused by this dam between its site and the north line of Section 11, Township 34, Range 9 East, which line is about 1.5 miles by river above the next higher lock and dam proposed by the Board re-

port (i. e., Lock No. 4 and Dam No. 2, at the foot of Treat's Island);

(c) that he will grant the United States a strip of land at least 150 feet wide across the north end of this dam, to be so located between it and the tow path of the present Illinois and Michigan Canal, as to connect the present mid river above, to the same below, in the manner approximately indicated on the accompanying blue prints; such strip to be used by the United States for the construction and maintenance of a boat lock, its necessary approaches, and the purposes of navigation;

(d) That he will do all the above, free of cost to the United States;

Provided that the War Department will waive any and all objections which it may have to the progress of such water power dam construction.

Very respectfully,

W. H. BIXBY,
Lt. Col., Corps of Engineers.

June 5, 1906.

5 inclosures:

Letter C. A. Munroe, Mar. 20 (520/0/9);

Report J. W. Woermann, Mar. 12 (520/0/8);

Blue prints (520/0/2; 520/0/7; 520/0/10).

(Blue prints in sep. roll.)

41 That there upon the Chief of Engineers of the United States Army concurred in said recommendations and reported the result of his findings and his recommendations to the Secretary of War; and thereupon, and on or about the 7th day of June, 1906, the War Department, by Robert Shaw Oliver, Assistant Secretary of War, sent to said Charles A. Munroe, a letter reading as follows:

War Department.

Washington, June 7, 1906.

Sir—

In reply to your letter of June 5, 1906, addressed to the War Department, in the matter of the construction by yourself and associates of a dam and spillway across the Desplaines River near its mouth, at the location and as shown on maps, submitted with your letter of March 20th, 1906, addressed to Lieutenant-Colonel W. H. Bixby, Corps of Engineers, U. S. Army, I have the honor to advise you as follows:

It is understood that yourself and associates are willing to comply with the following conditions, viz:

Report of
W. H. Bixby
dated Mar
27, 1906

Letter,
June 7, 1906

7, 1906.

First. That the details of construction shall be such as to insure permanency and of sufficient capacity to hold the water surface of its upper pool at a height equal to the present mean level of Lake Joliet (taken at 512.0 feet Memphis datum); and later whenever Congress shall have ordered the improvement of the Desplaines River for navigation purposes, the dam shall be raised by you and your associates 3.0 feet higher (giving pool level of 515.0 feet, Memphis datum), if the War Department shall so order; the United States and the public to have the free use of such pool so far as needed for navigation purposes, and the use of water for power purposes shall be so limited that the level of the pool shall at no time be reduced below that adopted for navigation in the plans of the United States for the slack-water improvement of the river.

Second. That the United States shall be protected from 42 claims for all flowage damages caused by the dam between its site and the north line of section 11, township 34, range 9 east, which line is about 1.5 miles by river above the next higher lock and dam proposed by the Board of Engineers' report (i. e., Lock No. 4 and Dam No. 2 at the foot of Treat's Island.)

Third. That there shall be conveyed to the United States free of cost a strip of land at least 150 feet wide across the north end of this dam, to be so located, between it and the tow path of the present Illinois and Michigan Canal, as to connect the present mid river above to the same below in the manner approximately indicated on the accompanying blue prints; the right of the United States to enter upon and use such strip of land for the construction and maintenance of a boat lock, its necessary approaches, and for other purposes of navigation, if it so desires, without liability for damages resulting in any way from its operation in connection with construction or maintenance of said lock and appurtenant works to be duly guaranteed.

If these conditions are complied with, in the opinion of the Chief of Engineers, U. S. Army, concurred in by this department, the work proposed is in general harmony with the work of improvement recommended by the Board of Engineers appointed under authority of the River and Harbor Act of June 13, 1902 (32 Stat. L., 331, 364), in its report dated August 26, 1905, printed as House Document No. 263 59th Congress, first session.

Inasmuch, however, as Congress has not as yet authorized the improvement of this river, this department does not deem

it expedient to take further and definite action in the matter of approving the plans.

Letter, June 7.

Very respectfully,

ROBERT SHAW OLIVER,
Assistant Secretary of War.

Mr. Charles A. Munroe,
The Rookery, Chicago, Illinois.

43 Defendant avers that afterwards, to-wit, on or about the 15th day of December, 1906, it acquired the interest of said Monroe and his associates in and to the lands hereinabove mentioned, for the purpose of constructing a water power that in February, 1907, Mr. Isham Randolph, Chairman of the Internal Improvement Commission of Illinois, a commission appointed by the Governor of the State of Illinois under an Act of the legislature of that State "to investigate the various problems associated with a projected deep waterway from Lake Michigan to the Gulf of Mexico," made an application to the Secretary of War in relation to the construction of defendant's proposed dam, and a hearing was had thereon before the Secretary of War on the 23rd day of February, 1907; that at such hearing there were present Brigadier-General Alexander Mackenzie, Chief of Engineers, U. S. Army; Mr. Isham Randolph, representing the State of Illinois; Hon. H. M. Snapp, Mr. J. W. Woermann, and Mr. Charles A. Munroe representing the Economy Light and Power Company; and that upon such hearing the following proceedings were had:

Secretary Taft: Gentlemen, as I understand this application, it is to prevent me from granting a permit to any person on the Desplaines River to build a dam for water power purposes, on the ground that the State is interested in supervising that matter itself. Is that about the size of it?

Mr. Randolph: Before proceeding I will present you a letter from the Governor of Illinois.

The position of the State, as I understand it, is this. I am appearing in this matter at the present time for the State, because as I understand it the Sanitary District has no interest in the present application whatever. The work of the Sanitary District, however, has made possible the development of very, very important water power on the Desplaines

44 and Illinois Rivers. Prior to the completion of that work the water powers on the Desplaines River were inconsequential. They amounted to but little. The water power on the Illinois River was somewhat better. There was one de-

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velopment at Marseilles. But the opening of the Sanitary District naturally has turned into those rivers a permanent volume of water which makes the development of the water powers possible on quite a valuable scale.

The interest of the State in this is to see that this asset is developed to the fullest extent, and that it shall be so developed as not to interfere with the creation of a waterway such as the State hopes to see put through. The Desplaines River rises in Wisconsin and crosses the State line into Illinois about six miles east of the west shore of Lake Michigan. It flows in a southerly and westerly direction for about 86 miles until it unites with the Kankakee River, and the two rivers form the Illinois River.

The resources of the State in coal, as you know, are very large, but they are being tremendously depleted by the constant demand upon them, and it seems to be the part of wisdom on the part of the State and its authorities to conserve all the natural resources which are available within its territory.

Therefore the last legislature authorized the Governor to appoint a board to be known as the Board of Internal Improvement of the State of Illinois, to consider all the questions affecting the development of the resources of the State, particularly its water ways and its water power. The idea of the Governor and this board is that no water power should be developed in such a way as to hinder the development of the waterway, or to militate against the highest development of all the water power that can be created by this new source of power flowing into the State from Lake Michigan; and for that reason the Governor has asked me to attend this meeting and to look out for the interests of the State in the case.

Secretary Taft: Your contention is then, Mr. Randolph, that the present application would not only interfere with
45 your plans for water power, but would also interfere with the navigation of the stream, as that navigation may be anticipated by improvement.

Mr. Randolph: That is not my contention, Mr. Secretary, because I have never had an opportunity of seeing the plans of these applicants.

Mr. Munroe: They are on file in this department.

Mr. Randolph: I have asked for them several times, but have never seen them. They may or they may not be in accordance with a proper development of waterways. If you will remember, the report of the Board of Engineers, who reported upon the deep waterway from Lockport to St. Louis states that they did not, in their consideration take up any

discussion of the water power. I will read from their report a question which covers the grounds. This I quote from page 12 of the report of the 'Board of Officers of the Corps of Engineers, U. S. Army,' upon the 14 foot waterway from Lockport to the mouth of the Illinois River (Document No. 263, 59th Congress, 1st Session) transmitted to you on the 12th day of December, 1905.

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'The plan submitted is not designed to develop water power but there will probably be no difficulty in modifying it so as to conform to such development if those who are to benefit thereby will co-operate with the Government. They should pay the cost of dams and damages from flowage, which is no more than they would be compelled to do if the Government made no improvement.'

I am not saying that the plan proposed is, or is not, an interference with an adequate waterway, or with the best development of water power, because I never had any chance to study the plan.

The board with which I am connected, has made a study of this whole question, and it finds that it is possible, under conditions of proper conservation, to develop the valley at least 173,000 horse power, which you must recognize as an exceedingly valuable asset for the State, if properly developed; and what we ask is that the work should be done systematically so that one work will not militate against the development of the other.

Mr. Snapp: Mr. Secretary, may I say a few words?

Secretary Taft: Yes, sir.

Mr. Snapp: Mr. Secretary, it has been said by Mr. Randolph that he appears here for the State, but I notice in the correspondence that has led up to this hearing that the original proposition proceeds from the Sanitary District of Chicago, and that their letter which has resulted in this proposition of the greatest importance that no vested rights should be encroached, addressed to the Governor of the State, says that, 'It is of the greatest importance that no vested rights should become entrenched in this valley, which would hamper the waterway and the highest interest of the State.'

So that, as a matter of fact, this proceeding, whatever it may be called, was initiated by the Sanitary District of Chicago.

I am interested in this matter in this way. The Sanitary channel terminates at Joliet, my native town. The Desplaines River, where this water power may be developed, lies almost wholly within my county. Like everyone else in that section of the country, I am vitally interested in two propositions:

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First, the construction of the navigable waterway, 14 feet deep, from Chicago to St. Louis, and incidently, in connection therewith, the highest possible development of water power incidentally created thereby. To properly consider these questions which have been brought before you, two important matters must be kept in mind: First, the rights of the Government in this case, and necessarily connected therewith, the rights of individuals. In other words, if the general government has no right, either to this property, or to the water power developed thereby, there can properly be no determination of this matter by any of the officers of the Government.

Now, as a matter of fact, all the property interest in the Desplaines Valley belongs to private parties. There is absolutely no public ownership of any land in the Desplaines 47 Valley. The stream is not a navigable stream. In low water the entire flow of the Desplaines river would come probably, through a six-inch pipe. It falls down hill, falling 100 feet in less than thirty miles. Neither the flow of the water nor the contour of the land makes the stream navigable, and it has been so held.

Secretary Taft: You say the Desplaines River is not a navigable stream?

Mr. Snapp: It is not a navigable stream, either in law or in fact. It could not be navigated in low water, in the natural condition of the river, by a birch bark canoe.

Secretary Taft: How do we get any jurisdiction of it, General Mackenzie?

Mr. Snapp: Let me answer, Mr. Secretary, as a lawyer. You have absolutely none, and I was going to bring to the attention of the Secretary.

Secretary Taft: Why do you come here for a permit, then?

Mr. Snapp: Let me explain that. We did not come for any permit. My interest in this, as a citizen, is for the best development of these interests. The people who owned this property at the mouth of the river and sought to develop this power went before the Board of Local Supervisors of our county for certain authority. I being most interested in the development of this waterway, took pains to see to it that they were refused that authority until an assurance could be given me and the Board of Supervisors by their plans—which I sought to have passed upon by the War Department—that the development of power under their plans would not interfere in any way with the development of the waterway. Therefore I compelled them by local pressure to submit the matter to General Mackenzie, not for the purpose of asking for permis-

sion to do this work, but for the purpose of satisfying myself and my people that the work contemplated would not, in the event that Congress authorized the waterway, interfere with it in the least, or make it more expensive to the Government. Is not that practically what we sought, general?

General Mackenzie: Yes, that is practically. We were a little puzzled. Speaking of the Desplaines river in its natural condition it would not be interfered with, but at that time Congress had caused a survey to be made for a 14-foot channel in the Desplaines river, and that put the river on a little different basis—that is, if the Government sought to carry out the 14-foot plan.

Secretary Taft: As a matter of fact, it is not now navigable?

General Mackenzie: It is not now navigable.

Secretary Taft: And if they sank a 14-foot channel in the river and affected private interests, they would have to buy them, would they not?

General Mackenzie: Yes. As Mr. Snapp says, these plans were brought here to the War Department. They were looked over and compared, and the War Department wrote a letter stating that if they satisfied certain conditions they would be in accord with the plans proposed by the Board of Engineers for the 14-foot project. I have a copy of the letter.

Secretary Taft: That is all they said:

General Mackenzie: That is all, sir. As they say, there is no application for this before the Department. No application has ever been made, and as Mr. Snapp said, it was simply that we went over the plans, and at their request this letter was written, to show that if these plans did satisfy certain conditions they would be in accordance with the report of that board, and the plan presented by that board.

Secretary Taft: But you are not seeking to exercise any authority over an existing navigable stream?

General Mackenzie: No, sir.

Secretary Taft: Or to grant a permit so as to protect the interests of the United States in the stream?

General Mackenzie: No, sir.

Secretary Taft: Suppose they were to go ahead without coming here at all; you could not go into court, or could not by an order of this department, prevent them from doing anything, could you?

General Mackenzie: I do not think we could. Of course, under all the conditions, so far as they have gone, possibly we would call the attention of the Department of Justice to

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ings of the matter, simply to have them consider it as a legal proposition.

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Secretary Taft. Where would the Department of Justice get any power?

General Mackenzie: Only from the general law, that in case of any violation of any law for the protection of navigable streams—

Secretary Taft: Yes, but the Desplaines river is not a navigable stream, is it?

General Mackenzie: It is not to-day, sir.

Secretary Taft: And it could not become so except by a declaration of Congress, and actual work done on it?

General Mackenzie: That is it, exactly.

Secretary Taft: Then where do I get any power to deal with it at all?

General Mackenzie: I do not know that there is any, Mr. Secretary.

Secretary Taft: Mr. Randolph, where do you find I get any power?

Mr. Randolph: Mr. Secretary, the Desplaines river was meandered by the United States Government as far as Romeo—

Secretary Taft: Was what?

Mr. Randolph: Was meandered.

Secretary Taft: That was for a survey, was it not? By "meandered" you mean "surveyed"?

Mr. Randolph: I mean surveyed, and the metes and bounds of the stream were established.

Secretary Taft: They did not fix any harbor lines, did they, on that stream?

General Mackenzie: No, sir.

Mr. Randolph: Of course I am stating this not as of my own knowledge, because I have no personal knowledge of it. That fact, and the fact that the stream was not conveyed along with other lands, still leaves the bed of the stream
50 vested in the United States. That is something for the lawyers, however, and not for me.

Secretary Taft: Would we own the bed of the stream?

General Mackenzie: No, sir, the state would have it.

Secretary Taft: I think so.

Mr. Snapp. If you will pardon me, Mr. Secretary, neither of you is right. It is what is called a meandered stream, for the purpose of survey only, and of ascertaining the quantity of the lands with their improvements in a section or a quarter section. It has been decided time and again by the Supreme

Court of Illinois and by the United States Supreme Court, that on meandered streams the owner of the property takes to the thread of the stream. It has been decided, Mr. Randolph, time and again, in suits in which you have been a witness in the Sanitary District, and for which you have contended that that is the law of the land.

Mr. Randolph: Not that I contended, for I don't know anything about the law.

Mr. Snapp: The Sanitary District so contended, and they had judgment after judgment entered in our courts, which were sustained by the Supreme Court of the United States. That has always been the law. This property belongs to private owners. There is absolutely no public ownership or interest in it. I say this, because I was for quite a while an attorney for the Sanitary District of Chicago, and attorney for the State of Illinois against the Sanitary District, in matters involving all these questions, and I know that what I say is true, that it is the established law of Illinois, sustained by the Supreme Court of the United States, that on meandered streams, navigable, or unnavigable, the abutting property owner takes to the thread of the stream.

Mr. Randolph: Is it not a fact that as attorney for the Illinois and Michigan Canal you contended that they owned the stream up to a certain point above the E. J. & E. Bridge?

Mr. Snapp: No, I contended in one case, because of
51 their riparian ownership of the bank of the canal, they did own a certain portion to the middle of the stream, but as the riparian owner only.

Secretary Taft: Do you represent the State of Illinois alone, or is there anyone else who has an interest?

Mr. Randolph: The Sanitary District has no interest in the present contention, that I can see. It is beyond the reach of any improvements which they propose to make.

Secretary Taft: I am about ready to dispose of this matter.

Mr. Snapp: Will you let me add one word further, Mr. Secretary?

Secretary Taft: Certainly.

Mr. Snapp: As I have said, my interest was to have an assurance that what they undertook to do here in the construction of water power would not interfere with the proper construction of the waterway. Plans were made and submitted to General Mackenzie, not for the purpose securing any permit, but as I said at the time, for the purpose of my personal information, that I might know, as the representa-

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ing of tive of that District urging this waterway that they were
 g the not to do something that would jeopardize or embarrass that.
 ary of That was all that was sought by me, and that was all that was
 on undertaken by the War Department. It resulted in plans
 3, 1907. being submitted and an opinion expressed that if the construction
 were pursued on the lines indicated by the plan it would
 not in any way embarrass the construction of the proposed
 waterway along the same line. That is all we sought, and
 that is all we obtained. That is all anybody wants.

General Mackenzie: In confirmation of that, in a letter dated June 7, 1906, addressed to Mr. Munroe at that time, after reciting certain conditions that must be satisfied by the plant, it is stated:

"If these conditions are complied with, in the opinion of the Chief of Engineers, U. S. Army, concurred in by this Department, the work proposed is in general harmony with the work of improvement recommended by the Board of Engineers
 52 appointed under authority of the River and Harbor Act of June 13, 1902, in its report dated August 26th, 1905, printed as House Document No. 263, 59th Congress, 1st Session.

"Inasmuch, however, as Congress has not as yet authorized the improvement of this river, this Department does not deem it expedient to take further and definite action in the matter of approving the plans."

Decision of the Secretary of War.

Secretary Taft: There are two answers to the contention of the State of Illinois in this matter. The application, if I understand it—and it is rather informal than otherwise—is for this Department to take no official action which may interfere with the state control of the water power, which may be developed in the Desplaines river under a proposed improvement by the construction of a 14-foot waterway; and also to take no action which may interfere with the waterway as a waterway.

There are two answers to that. The Department is not going to take any action, and has not taken any action of any sort. The advisory step, taken at the instance of Mr. Snapp or the persons who intended to put some sort of water power construction in the Desplaines river, was extra-official, and really was beyond the authority of the Chief Engineer, except as he was accommodating and was ready to express an opinion, in the interest of explanation.

The truth is that the Desplaines river not being a navigable stream, no permit was necessary to put any obstruction into

it which the War Department could prevent. But even if it had been a navigable stream, and even if the application had been made, and properly made to this Department to say whether this would interfere with navigation, if the Department concluded that it would not interfere with navigation then it is not within the power of the Department to withhold its expressing such an opinion and granting such a permit, so far as the United States is concerned, for the purpose of aiding the state in controlling the water power. If the
53 state has any control over the water power, which it may exercise, in conflict with the claimed rights of the riparian owner, then it must exercise it itself, through its own legislation and through its own executive officers.

All the United States does, assuming it to be a navigable stream, is merely to protect the navigation of the stream. With reference to the water power it has no function except in respect to water power which it itself creates by its own investment, in property that it itself owns; and then of course it may say how that water power shall be used. But with respect to the water power on a navigable stream, which may be exercised without interference with the use of the river for navigation purposes, that is controlled by the laws of the state. It is controlled by the riparian ownership and by the common law, as it governs those rights. Therefore, I do not see, with reference to this matter, that this Department has any function whatever to perform, or which it can perform. It has merely offered a friendly suggestion that with reference to a possible improvement of the river, which has not been authorized, and which until it is authorized cannot be regarded, as giving any right to this Government to interfere in the use of the stream, the proposed action by the private owners here would not be in conflict with such a plan. That is an expression of an opinion with reference to existing plans, and not with respect to existing conditions.

Therefore, what General Mackenzie has done out of the kindness of his heart does not commit this Department to any assertion of authority in the matter, and certainly does not carry us to the necessity of retracing our steps and saying that they shall not go on with this, when we had not any power to interfere at all.

It is not that we approve this; it is not that we disapprove it. It is that we have nothing whatever to do with it. That is the truth of it.

If the state wishes to control the matter of the water power, then it is for the legislature, through which it can ex-

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ings of press that view, in so far as it may constitutionally affect it
ing the by legislation.

54 General Mackenzie: That is virtually what was told
ary of the Governor, Mr. Secretary, and this is the result of one
on of our endorsements.

Secretary Taft: All right, I think that disposes of it."

That thereafter, and relying upon the attitude of the United States through the course of a hundred years, and the reports of its engineers, and relying upon the correspondence passing between the War Department and the said Charles A. Munroe, and upon the decision of the Secretary of War upon the application of said Isham Randolph, this defendant began the actual construction of its dam, which is sought to be restrained in this case, and has expended large sums in and about the same and has incurred liabilities for other large sums, and defendant avers that the present action of the United States as to the navigability of said stream is inequitable and unjust and that it ought not now to be permitted to harass and annoy this defendant by claiming a public highway therein.

Defendant further avers that on December 30, 1907, the Attorney General of Illinois filed an information in the nature of a bill in equity against this defendant in the Circuit Court of Grundy County, Illinois, and obtained a preliminary injunction restraining defendant from proceeding further with the work. That said bill claimed, among other things, (1) that the title to the bed of the Desplaines river at the site of the dam was in the State of Illinois and (2) that the river was a navigable stream; that after a full hearing, the trial court on June 27, 1908, found the issues for the defendant and entered a decree dismissing the bill for want of equity. An appeal was taken to the Supreme Court of Illinois, and that Court on October 26, 1909, affirmed the decree and held that the title to the land on

55 which defendant's dam was being constructed was in the defendant, and that the said Desplaines river was not a navigable stream in law or in fact. And this defendant avers that said action, in so far as it involved the character of the Desplaines River, and the title of this defendant to the land and river bed within the meander line of said Desplaines river was a proceeding in rem., and that the decree of the Circuit Court of Grundy County, affirmed by the Supreme Court of the State of Illinois, in so far as it passed upon the question of the character of the Desplaines river and de-

fendant's title to said land, is a judgment in rem., and is binding upon the world, so long as it remains unreversed.

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Complainant admits the adoption by the Legislature of the State of Illinois of the Act of May 29, 1889, entitled, "An Act to create sanitary districts and to remove obstructions in the Desplaines and Illinois Rivers," and for the provisions of said Act refers to Laws of Illinois of 1889, pages 126, et seq., where said Act in full and at length appears.

But defendant avers that the purpose of said Act, and it has been so held by the Supreme Court of the State of Illinois, was drainage and sanitation and not the creation of a navigable channel. Defendant admits that pursuant to the provisions of the Act of May 29, 1889, the Sanitary District of Chicago constructed a channel connecting the Chicago River with the said Desplaines River; admits that upon the completion of such Sanitary District Channel, and prior to the commencement of the construction by this defendant of its said dam in the Desplaines River, to-wit, in the year 1900, said Sanitary District of Chicago, pursuant to said Act, did divert through its said channel from Lake Michigan into said Desplaines River, water to the amount of about 300,000 cubic
56 feet per minute; and that continually since the opening of said Sanitary District Channel, there has been diverted from Lake Michigan through said channel into said Desplaines River, at a point above that at which this defendant has commenced the construction of its said dam, a quantity of water amounting to about 300,000 cubic feet per minute; admits that said Sanitary District Channel is and has been since the opening of said channel in 1900 navigable water, but denies that said Sanitary District Channel is navigable waters of the United States or that it is subject to the jurisdiction and control of the Federal Government.

Defendant avers that it was provided in and by said act that whenever the General Government, after the water should have been turned into said Sanitary District Channel should improve the Desplaines and Illinois Rivers for navigation to connect with said Sanitary District Channel, the general government should have full control over the Sanitary District Channel for navigation purposes, but not to interfere with its control for sanitary or drainage purposes; but defendant avers that the general government has not improved the Desplaines and Illinois Rivers for navigation, or otherwise, and has no control over said Sanitary District Channel for navigation purposes, or otherwise.

Defendant avers that the sole and only purpose of the or-

ver, filed
b. 28, 1910.

ganization of said Sanitary District and the construction of said Sanitary District Channel was drainage and sanitation and not navigation, and that although a navigable channel was constructed, navigation was in no sense the purpose, or one of the purposes, of the organization of such District, and the construction of said channel, and whenever the use of said channel for navigation should interfere with its use for drainage and sanitation, navigation must give way to the extent that it interferes with drainage and sanitation.

57 And defendant avers that said Sanitary District Channel was constructed by taxes levied upon the inhabitants of said Sanitary District, and that said Sanitary District Trustees hold said channel in trust for drainage and sanitary purposes, and that neither said Sanitary Trustees nor the State of Illinois nor the complainant in this case has authority to divert said channel from such use.

Defendant admits that in connection with the construction of said Sanitary District Channel said State of Illinois has caused the quantity of water flowing through said Desplaines River, below the point at which it connects with said channel, to be largely increased; but denies that said portion of said river has been continuously, or at any time, since the opening of said channel, or now is, water navigable in fact, or a part of the navigable waters of the United States, or subject to the jurisdiction or control of the Federal Government; denies that since the quantity of water flowing through said portion of said Desplaines River has been thus artificially increased, the only substantial obstructions to the navigability of said river are certain rapids between the portion of said river known as the Upper Basin, that is, the portion of said river in which it follows the channel of the Illinois and Michigan Canal, and the portion of said river known as Lake Joliet, and certain other rapids at Treat's Island and Dresden Heights in said river. And denies that, with the exception of the difficulties arising on account of said rapids, said river has been since the opening of said Sanitary District Channel, or now is, capable of being navigated for purposes of commerce. It admits that the difficulties arising on account of such rapids are capable of being overcome through the improvement of said river by locks, canals and dams; but defendant avers that such difficulties can only be so overcome, by the con-

58 struction of such locks, canals and dams as would entirely change the character of said river and create a navigable stream where one does not now exist, and defendant avers that the construction of said Sanitary District Channel, and the

turning into said Desplaines River has not and cannot destroy the rights of this defendant, and its predecessors in title as riparian owners along said stream.

Answer,
Feb. 21,

Defendant denies that in connection with, and as a result of, the construction of said Sanitary District Channel and the diversion of said water from Lake Michigan, the said Sanitary District of Chicago has largely increased the navigability of the said Desplaines River, or that continuously since the opening of said canal there has been, or now is, in said portion of said Desplaines River, below the point at which it connects with said canal, a body of water navigable in fact, or which, by virtue of its connection with other navigable waters, is to be deemed a part of the navigable waters of the United States, or subject to the jurisdiction and control of said United States; and denies that the control over said body of water exists in the United States in the exercise of its power to regulate commerce; and defendant avers that down to the time of said diversion of said water from Lake Michigan into said Desplaines River, no right or power of control ever existed in the United States over the said Desplaines River, or the waters thereof; and denies that by reason of said diversion of water from Lake Michigan into said Desplaines River, or on any other account, the said United States ever acquired any right or power of control therein.

Defendant admits that by Section 9 of the River and Harbor Appropriation of March 3, 1899, Chapter 425, it is provided that it shall not be lawful to construct or commence the construction of any bridge, dam, dyke, or causeway
59 over or in any port, roadstead, haven, harbor, canal, navigable river or other navigable waters of the United States until the consent of Congress to the building of such structures shall have been obtained, and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War and that such structures may be built under the authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced. But defendant avers that said Desplaines River is not a port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States, and defendant alleges on information and belief that many bridges and dams have been built, con-

er. filed
28, 1910.

structed and maintained over, in and across the said Desplaines River since the passage of said act, without the consent of Congress to the building of such structures, and without the submission of plans to, or the approval of the same by, the Chief of Engineers or the Secretary of War, and without authority of the Legislature of the State of Illinois. Defendant avers that the purpose of said act was to protect existing commerce, and that there is no commerce on said Desplaines River to protect, and that said act does not apply to said stream.

Defendant admits that in the year 1907, it commenced the construction of its said dam in said Desplaines River, and has already constructed a portion thereof, and that it has never obtained the consent of Congress to the building of said dam, and that the location and plans for construction of said dam, have not been approved by the Chief of Engineers or by the Secretary of War, except as hereinabove stated; but it denies that the same were required by said Act; admits that it 60 asserts and maintains that said Desplaines River is not a navigable river or a navigable water of the United States, and that the authority and permission provided by said Act of March 3, 1899, is not required for the construction of said dam; admits that it has refused, and still refuses, to remove the portion of said dam already constructed, and admits that it will complete the construction of said dam unless prevented by injunction of this court. Denies that the portion of said dam already constructed is a structure erected in violation of the provisions of said Act of March 3, 1899, or that if the construction of said dam is completed by said defendant, said structure will be a permanent, or any, obstruction in said river, or that it will irreparably injure and damage, or injure and damage to any extent, the rights and property of the United States.

Defendant denies that an adequate remedy in the premises can only be obtained in a court of equity, but avers that if the United States have any property rights in the lands and river bed within said meandor lines, such rights may be enforced as promptly, effectively and completely in a court of law as in a court of equity.

Defendant denies that any of the allegations of said bill not herein well and sufficiently answered unto, traversed and avoided or denied are true.

Defendant denies that the complainant is entitled to the relief prayed for in said bill, or to any part thereof, and de-

defendant prays the same advantage of this answer as if it had pleaded or demurred to said bill of complaint, and it prays to be hence dismissed with its reasonable costs in this behalf, most wrongfully sustained.

ECONOMY LIGHT & POWER COMPANY,
By SCOTT, BANCROFT and STEPHENS,
Its Solicitors.

ISHAM, LINCOLN & BEALE,
SCOTT, BANCROFT & STEPHENS,
Solicitors for said Defendant.

(Endorsed) Filed Feb., 28, 1910, H. S. Stoddard, Clerk.

61 And afterwards to-wit: on the eleventh day of April, 1910, came the complainant in said entitled cause by the United States Attorney for the Northern District of Illinois and filed in the Clerk's office of said Court its certain Replication, in words and figures following to-wit:

62 IN THE CIRCUIT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois,

Eastern Division.

United States of America	} No. 29776.
v.	
Economy Light and Power Company.	

The replication of the United States of America complainant herein, to the answer of the Economy Light and Power Company, defendant herein.

This repliant, saving and reserving to itself now and at all times hereafter all and all manner of advantage of exception which may be had and taken to the manifold insufficiencies of the said answer, for replication thereunto says that it will aver, maintain, and prove its bill of complaint to be true, certain, and sufficient in law to be answered unto, and that the said answer of the said defendant is uncertain, untrue, and insufficient to be replied unto by this repliant, without this: that any other matter or thing whatsoever in the said answer contained, material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently

Answer.
Feb. 28,

Replication
filed
1910.

Application,
and Apr. 11,
1910.

replied unto, confessed and avoided, traversed or denied, is true, all which matters and things this repliant is and will be ready to aver, maintain, and prove, as this honorable court shall direct, and humbly prays, as in and by its said bill it has already prayed.

EDWIN W. SIMS,
United States Attorney, Solicitor for Complainant.

(Endorsed) Filed Apr. 11, 1910. H. S. Stoddard, Clerk.

of
25, 1917.

63 And on to-wit: the twenty-fifth day of May, 1917, in the record of proceedings in said entitled cause, before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

United States of America,	} 29776.
<i>vs.</i>	
Economy Light and Power Company.	

Now comes the defendant and moves the Court for leave to amend its answer to the bill of complaint herein to conform to the evidence and to the arguments heretofore made upon the hearing of said cause, in accordance with draft of such proposed amendment now submitted to the Court, and said motion is hereby granted, and said defendant is given leave to file said amendment instantler, which is done, and it is further ordered that the replication of the complainant heretofore filed herein stand as and for its replication to said answer as amended.

KENESAW M. LANDIS,
Judge.

64 And on to-wit: the twenty-fifth day of May, 1917, came the defendant in said entitled cause by its solicitors, and by leave of court, first had and obtained, filed in the clerk's office of said court its certain Amendment to Answer, in words and figures following to-wit.

65

AMENDMENT TO ANSWER.

Amendment
to answer
filed M
1917.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern Division of the

Northern District of Illinois.

United States of America

—vs—

Economy Light and Power Company

} In Chancery.
No. 29776.

Now comes the defendant, the Economy Light and Power Company, by its solicitors and moves the Court for leave to amend its answer to the bill of complaint herein to conform to the evidence and to the arguments heretofore made upon the hearing of said cause as follows:

By inserting, after the sentence, "Defendant avers that the purpose of said Act was to protect existing commerce and that there is no commerce on said Desplaines river to protect and that said Act does not apply to said stream," the following:

"And the defendant says that the Desplaines River is not in fact, capable of navigation for purposes of useful commerce, and that neither Section 8, Article 1 of the Constitution of the United States, nor the Act of Congress of March 3, 1899, or any other Act of Congress, is applicable to such stream.

And further defendant says that there is not, and has not been within the memory of mankind, any commerce upon said Desplaines River, and that the Congress of the United States has no power under the Constitution, to control or regulate the use of said river.

56 And defendant further answering says that if said Act of Congress of March 3, 1899, or any of the Acts of Congress mentioned in said bill of complaint or relied upon by the complainant should be held to establish the character of said Desplaines River as navigable, then said Acts, and each of them, are, and is, unconstitutional, notwithstanding the Ordinance of 1878, or any of the Acts of Congress for the government of the territories.

This defendant further answering denies that the Act of March 3, 1899, or any other Act of Congress, applies to said Desplaines River, and also further insists that if any of said Acts are held to apply to said river, the same are null and void

ament
answer,
May 25,
7.

under the provision of the Fifth Amendment to the Constitution of the United States, forbidding the taking of property without due process of law and the taking of private property for public use without just compensation."

SCOTT, BANCROFT, MARTIN & STEPHENS,
ISHAM, LINCOLN & BEALE,

Solicitors for Defendant.

(Endorsed) Filed May 25, 1917, T. C. MacMillan, Clerk.

of
25, 1917.

67 And on the same day to-wit: the twenty-fifth day of May, 1917, in the record of proceedings in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

United States of America,	} 29776.
vs.	
Economy Light and Power Company.	

Upon motion, it is ordered by the court that leave be and the same is hereby granted the respective parties hereto, to file their abstract of proofs and books of maps as of December 4, 1912.

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inion,
Nov. 7,

68 And on to-wit: the seventh day of November, 1916, there was filed in the clerk's office of said court in said entitled cause a certain Memorandum of Opinion in words and figures following to-wit:

MEMO. FOR OPINION.

United States	}
vs.	
Economy Light & Power Company	

Bill to enjoin defendant from constructing dam across Desplaines River brought under statute authorizing Attorney-General to so proceed when navigable water of U. S. is obstructed without permit of War Department. Question: "Is river navigable stream within meaning of statute"? Navigable waters of U. S. defined by Supreme Court in Montello case, 87-439. ****

Test is whether river was used or was susceptible of being

used in its ordinary condition as highway of commerce for trade and travel in customary mode and of trade and travel by water. Inquiry is as to the time when actual navigability is averred, that is to say, when it is claimed stream was actually navigated or was actually susceptible of such use by the customary modes of trade or travel at that time. This results from early acts of Congress after adoption of constitution perpetually dedicating as highways of commerce rivers, etc., then impressed with that character.

U. S. claims (among other uses) actual navigation from early fur trading days down to end of first quarter of last century. Proof of actual specific use by customary mode of trade and travel by water, that is, by kind of craft then used for that purpose on rivers of U. S. throughout this period appears. Controversy has really been as to extent rather than to the fact of such use. This evidence taken with existence of portage from Chicago River to Desplaines during time mentioned a large collection of historical documents, contemporaneous maps and governmental records and reports forbids conclusion river was not subjected to such use for trade and travel down to and subsequent to enactments of original (?) legislation referred to. From this, follows river shown by evidence to be navigable water of U. S. when bill filed and at present time.

No evidence of actual navigation within the memory of living man, therefore no present interference with navigation by placing obstruction in stream. Query: Does act authorize injunction? Question would be serious in absence of actual present injury were it not that legislation enacted at time of general public interest in internal navigation development and improvement and government activity looking to that end. Act considered with its predecessor exhibits intention of Congress to then assume and exercise control over whole subject matter and specifically to prevent thenceforward the placing of further obstructions in navigable waterways unless permitted so to do under the terms and conditions prescribed by governmental department given authority and charged with responsibility of its exercise.

Judgment of State Supreme Court against navigability in Illinois vs. present defendant obviously rendered on record vitally differing in the facts from record here as to actual use of stream for trade and travel by customary mode at time of use. Therefore, that judgment not persuasive, it appearing from court's opinion to have been based on the absence of evi-

Memorandum
of opinion
filed
1916.

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Nov. 7,

dence from that record as to such use which evidence is present here.

Claims of government that injunction should issue because of riparian ownership theory untenable—absence of proof of ownership. Also claim of right to injunction because river is now actually navigable within meaning of Montello doctrine untenable, because present volume of water due to artificial cause.

Delay in deciding this cause not source of pride to this court. Due to several things, but in the main responsibility is in the court.

Order finding Desplaines River navigable water of U. S. within meaning of Act of Congress, that Attorney General authorized to bring bill; that construction of dam would be obstruction of such navigable stream without permit of War Dept., and that injunction issue as prayed.

(Endorsed) Filed Nov. 7, 1916, T. C. MacMillan, Clerk.

6, 1917.

70 And on to-wit: the twenty-fifth day of May, 1917, in the record of proceedings in said entitled cause, before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

71 IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois,

Eastern Division.

United States of America	} In Chancery,
<i>v.</i>	
Economy Light and Power Company	No. 29776.

Argument having been heard upon the demurrers to the Bill of Complaint herein, it is

Ordered that said demurrers and each of them be, and they are hereby, overruled, to which ruling defendant excepts, and thereupon the cause came on to be heard and was argued by counsel, and thereupon, upon consideration thereof, it was

Ordered, Adjudged and Decreed as follows:

That the equities are with the complainant; that said structure described in said bill of complaint as being constructed by said defendant in said river is a structure erected in viola-

tion of the provisions of Section 9 of the Act of March 3, 1899, and that the defendant, its officers, agents, representatives and grantees and assigns and all persons acting for it, or under its authority, or under authority of any grant or conveyance from it, are perpetually enjoined from placing any further obstruction in that portion of the Des Plaines River, where said dam was being constructed by said defendant as set forth in said bill, and from doing any other work in connection with the erection or construction of said dam mentioned in said bill of complaint, and that said defendant is hereby ordered to remove the portion of said dam which
72 has been constructed by said defendant as described in said bill, within six months from this date, or within such further time as the Court may specifically order for that purpose. And it is further

Ordered and Decreed that defendants pay the costs of this suit to be taxed by the Clerk, and that execution issue therefor. To the which findings and decree and to every part thereof, the defendants excepts.

KENESAW M. LANDIS.

Dated this 25 day of May, A. D. 1917.

73 And on to-wit: the third day of July, 1917, in the record of proceedings in said entitled cause, before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

United States of America, }
vs. } 29776.
Economy Light & Power Co. }

On motion of defendants, it is ordered that the matters introduced in evidence upon the hearing of this case, and not appearing in the printed proofs, and defendant's Exhibits one, two, three and four, received in evidence on the twentieth day of December, 1915, be filed nunc pro tunc as of December 20, 1915.

74 And on to-wit: the fourteenth day of July, 1917, came the defendant in said entitled cause by its solicitors and filed in the clerk's office of said court, its certain Petition for Appeal and Assignment of Errors in words and figures following to-wit:

Decree
May

Order
July

75

PETITION FOR APPEAL.

United States of America }
 Northern District of Illinois }
 Eastern Division }

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern Division of the

Northern District of Illinois.

United States of America }
 —vs— }
 Economy Light & Power. Co. }

The above named defendant, Economy Light & Power Company, conceiving itself aggrieved by the order and decree made and entered in the above entitled cause on the 25th day of May, 1917, does hereby appeal from said order and decree to the United States Circuit Court of Appeals for the Seventh Circuit, for the reasons specified in the Assignment of Errors filed herein, and prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which said order and decree were made (excepting the volume of maps) duly authenticated, and the original of the volume of maps, may be sent to the United States Circuit Court of Appeals, for the Seventh Circuit.

SCOTT, BANCROFT, MARTIN & STEPHENS,
*Solicitors for defendant, Economy
 Light & Power Company.*

(Endorsed) Filed July 14, 1917, T. C. MacMillan, Clerk.

ASSIGNMENT OF ERRORS.

Assignment
errors
July 14.

United States of America, }
Northern District of Illinois, } ss.
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern Division of the

Northern District of Illinois.

United States of America, }
—vs— } In Chancery
Economy Light & Power Company. } No. 29,776.

The Economy Light and Power Company, defendant in the above entitled cause, says that in the record and proceedings therein, and in the order or decree entered therein on the 25th day of May, 1917, manifest error has occurred to the prejudice of said defendant, and it assigns for error the following:

1. That the said District Court erred in said decree in overruling each and every of the grounds of demurrer set forth in defendant's answer to the bill of complaint herein.
2. That the said court erred in said decree in finding that the equities are with the complainant.
3. That the said court erred in said decree in holding that the structure described in said bill of complaint as being constructed by said defendant in said Des Plaines River is a structure erected in violations of the provisions of Section 9 of the Act of March 3, 1899.
4. That the said court erred in said decree in enjoining the defendant, its officers, agents, representatives, grantees and assigns, and all persons acting for it or under its authority, or under authority of any grant or conveyance from it, from placing any further obstruction in that portion of the Des Plaines River where said dam was being constructed by said defendant, as set forth in said bill, and from doing any other work in connection with the erection or construction of said dam mentioned in said bill of complaint.
5. That the said court erred in said decree in ordering the said defendant to remove the portion of said dam which has been constructed by it, as described in said bill.

ment of
w. filed
14, 1917.

6. That the said court erred in said decree in ordering that the costs of said suit be taxed against the defendant.

7. That the said court erred in not finding for the defendant upon the ground that the Des Plaines River is not, in fact, capable of navigation for purposes of useful commerce, and that neither Section 8, Article I, of the Constitution of the United States, nor the Act of Congress of March 3, 1899, or any other Act of Congress, is applicable to said stream.

8. That the said court erred in not finding for the defendant upon the ground that there is not, and has not been, within the memory of mankind, any commerce upon the Des Plaines River, and that the Congress of the United States has no power under the Constitution to control or regulate the use of said river.

78 9. That the said court erred in not finding for the defendant upon the ground that if said Act of Congress of March 3, 1899, or any other of the Acts of Congress mentioned in said bill of complaint, or relied upon by the complainant, should be held to establish the character of said Des Plaines River as navigable, then said Acts, and each of them, are and is unconstitutional, notwithstanding the Ordinance of 1787, or any of the Acts of Congress for the government for the Northwest Territory.

10. That the said court erred in not finding for defendant upon the ground that if the Act of March 3, 1899, or any other Act of Congress mentioned in said bill of complaint, or relied upon by complainant, applies to the Des Plaines River, said Acts are null and void under the provisions of the Fifth Amendment to the Constitution of the United States, forbidding the taking of property without due process of law and the taking of private property for public uses without just compensation.

11. That said court erred in not finding for the defendant upon the ground that the Des Plaines River is not now a navigable stream.

12. That said court erred in not finding for the defendant upon the ground that the Des Plaines River was not a navigable stream in a state of nature.

79 13. That said court erred in not finding for the defendant upon the ground that the United States is estopped from now claiming or contending that the Des Plaines River is a navigable stream.

14. That the said court erred in not finding for the defendant upon the ground that the judgment and decision of the Circuit Court of Grundy County, Illinois, and of the Su-

preme Court of Illinois affirming said judgment, entered in the case of People of the State of Illinois against the Economy Light and Power Company, was a judgment in rem establishing the character of the Des Plaines River as a non-navigable stream in a state of nature.

Assignment
of errors,
July 14,

15. That the said court erred in not finding for the defendant upon the ground that the judgment and decision of the Circuit Court of Grundy County, Illinois, and of the Supreme Court of Illinois affirming said judgment, entered in the case of People of the State of Illinois against the Economy Light and Power Company, was a judgment in rem establishing the character of the said Des Plaines River as a non-navigable stream, notwithstanding the additional flow of water turned into said stream from the Sanitary District Channel.

16. That said court erred in not finding for the defendant upon the ground that the said Des Plaines River is not navigable water of the United States.

And by reason of such errors, defendant prays that said order and decree of May 25, 1917, be reversed and re-manded with directions to said District Court to enter a decree in favor of defendant.

SCOTT, BANCROFT, MARTIN & STEPHENS,
*Solicitors for said defendant, Economy
Light & Power Company.*

(Endorsed) Filed July 14, 1917, T. C. MacMillan, Clerk.

81 And on the same day to-wit: the fourteenth day of July, 1917, in the record of proceedings in said entitled cause, before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

82 And on to-wit: the fourteenth day of July, 1917, in the record of proceedings in said entitled cause before the Hon. Kenesaw M. Landis, District Judge, appears the following entry to-wit:

of
14, 1917.

United States of America, }
vs. } 29776.
Economy Light & Power Co. }

On motion of Scott, Baneroft, Martin & Stephens, solicitors and counsel for defendant, Economy Light & Power Company,

It is ordered that an appeal to the United States Circuit Court of Appeals, for the Seventh Circuit, from the order and decree heretofore filed and entered herein on, to-wit, the 25th day of May, 1917, be, and the same hereby is, allowed upon the giving of a bond in the sum of \$1,000.00 within twenty days to be approved by clerk District Court conditioned according to law, and that a transcript of the record, testimony, exhibits, stipulations and all proceedings herein (excepting the book of maps) and the original of said book of maps, be forthwith transmitted to the United States Circuit Court of Appeals for the Seventh Circuit.

It is further ordered that the bond herein above provided for shall act as a supersedeas bond, and also as a bond for costs and damages on appeal.

Dated this 14 day of July, 1917.

KENESAW M. LANDIS,
Judge.

83 And on to-wit: the twentieth day of July, 1917, there was filed in the clerk's office of said court, a certain Bond on Appeal in words and figures following to-wit:

United States of America }
Northern District of Illinois } ss.
Eastern Division }

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern Division of the

Northern District of Illinois.

United States of America, }
vs. } In Chancery.
Economy Light and Power Company. } No. 29,776.

Bond on Appeal.

Know All Men By These Presents: That Economy Light and Power Company, a corporation, as Principal and National Surety Company as Surety, are held and firmly bound unto the United States of America in the full and just sum of One Thousand Dollars, to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves, our executors, administrators and successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of July, in the year of our Lord, One Thousand Nine Hundred and Seventeen.

Whereas, lately at a session of the District Court of the United States, for the Eastern Division of the Northern District of Illinois, in a suit pending in said court between the United States of America, complainant, and Economy Light and Power Company, defendant, a decree was entered on, to-wit, the 25th day of May, 1917, in favor of the complain-
85 ant and against the defendant, Economy Light and Power Company; and,

Whereas, the defendant has obtained from said court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit to reverse said decree, and a citation directed to the said United States of America is about to be issued, citing and admonishing the said United States of America to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago, Illinois;

on
al. filed
20, 1917.

Now, Therefore, The Condition Of The Above Obligation is such that if the said defendant, Economy Light and Power Company shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it, if it fail to make its plea good, then the above obligation is to be void; otherwise, to remain in full force.

ECONOMY LIGHT AND POWER COMPANY,
By CHARLES A. MUNROE
Its President.

(Corporate Seal)

Attest:

JOHN H. GULICK,
Secretary.

NATIONAL SURETY COMPANY
By CHAS. H. BURRAS
Its Resident Vice-President.
ANTON A. BLAZEVICH
Resident Ass't Secretary

(Corporate Seal)

The above and foregoing Bond Approved this 20th day of July, A. D. 1917.

T. C. MACMILLAN,
Clerk.

(Endorsed) Filed July 20, 1917, T. C. MacMillan, Clerk.

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d. filed
6, 1917.

86

PRAECIPE FOR RECORD.

United States of America,
Northern District of Illinois, } ss.
Eastern Division.

IN THE DISTRICT COURT OF THE UNITED STATES

For the Eastern Division of the
Northern District of Illinois.

United States of America,
vs. } No. 29776.
Economy Light and Power Company.

Praeceptum for Record.

To the Clerk of Said Court:

The clerk will please prepare and authenticate a transcript of the record in the above entitled cause on appeal to the

United States Circuit Court of Appeals for the 7th Circuit, and include therein the following:

Praecepta
transcript
record,
Aug. 6,

1. Bill of Complaint, filed December 14, 1909.
2. Answer of defendant, filed February 28, 1910.
3. Replication of complainant to defendant's answer, filed April 11, 1910.
4. Order allowing amendment to answer, entered May 25, 1917.
5. Amendment to answer, filed May 25, 1917.
6. Proofs of complainant and defendant, filed May 25, 1917, nunc pro tunc as of December 4, 1912.
7. Orders entered July 3, 1917, that proofs received in evidence upon hearing of the case, and not appearing in printed abstracts of proofs, and defendant's Exhibit 1, 2, 3, and 4, admitted in evidence on the 20th day of December, 1915, be filed nunc pro tunc, as of December 20, 1915.
8. Proofs and Exhibits filed July 3, 1917, nunc pro tunc, as of December 20, 1915, pursuant to order last above mentioned.
- 87 9. Opinion of Judge Landis, filed Nov. 28, 1916.
10. Petition for appeal, filed July 14, 1917.
11. Order allowing appeal and ordering citation to issue, entered July 14, 1917.
12. Assignment of Errors, filed with petition for appeal, July 14, 1917.
13. Appeal bond, filed and approved July 20, 1917.
14. Pursuant to order of July 14, 1917, allowing appeal you will also transmit to the clerk of the United States Circuit Court of Appeals for the 7th Circuit the original book of Maps, filed May 25, 1917, nunc pro tunc as of December 4, 1912.

SCOTT, BANCROFT, MARTIN & STEPHENS,
Solicitors for Defendant.

O. K.

CHARLES F. CLYNE,
United States Attorney,
Solicitor for Complainant.

(Endorsed) Filed Aug. 6, 1917, T. C. MacMillan, Clerk.

88 Northern District of Illinois } ss.
Eastern Division.

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record, made in accordance with Praeceptum, filed in this Court, in the cause entitled United States of America, vs. Economy Light and Power Company, as the same appear from the original records and files thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this sixth day of August, 1917.

T. C. MACMILLAN,

(Seal)

Clerk.

89 United States of America, } ss.
Northern District of Illinois.

IN THE DISTRICT COURT OF THE UNITED STATES

United States of America, }
vs. } 29776.
Economy Light and Power Company.

VOLUME IV OF PROOFS.

(Endorsed) Filed July 3, 1917, Nunc pro tunc as of December 20, 1915. T. C. MacMillan, Clerk.

90 MATTERS INTRODUCED UPON THE HEARING
AND NOT APPEARING IN THE PRINTED RECORD.

Introduced on behalf of Complainants.

Excerpts from book entitled, "A View of the Lead Mines of Missouri, including some observations on the Mineralogy, Geology, Geography, Antiquities, Soil, Climate, Population and productions of Missouri and Arkansas, and other sections of the western country. Accompanied by three engravings. By Henry R. Schoolcraft, Corresponding Member of the Ly-

ceum of Natural History of New York, New York. Published by Charles Wiley and Company, No. 3 Wall Street, 1819." Excerpts
book.

"The River Plein, the main head fork of Illinois, approaches so near the head of Chicago River, which enters Lake Michigan at Fort Dearborn, that a communication exists in high water. I conversed with a trader last summer at St. Louis, who had come through in the spring, and afterwards saw his boat lying at the wharf. It carried from 4 to 6 tons, and was built skiff-fashion, with a flat bottom. He represented the undertaking as easy of execution, not requiring an artificial cut of more than 2 miles, and this through an alluvial soil." (p. 41)

"The Illinois is also a stream affording a great length of navigation, and lands of superior quality, and has a natural connection with the great north western lakes, by which boats may, at certain seasons, uninterruptedly pass from Lake Superior, and the Lake of the Woods." (p. 161)

"The Illinois is navigable 300 miles, and when the communication between it and Lake Michigan—between the Mississippi, and Lake Superior, and the Lake of the Woods—between the Missouri and the Columbia—between the Yellowstone and the Multnomah, shall be effected, communications not only pointed out, but almost completed by nature, what a chain of connected navigation shall we behold? and by looking upon the map, we shall find St. Louis the focus where all these streams are discharged, the point where all this vast commerce must centre, and where the wealth, and the refinements flowing from these prolific sources, must pre-eminently crown her the queen of the west." (p. 243)

At the request of counsel for defendant the counsel for complainant also read the following from the same book:

"A man who merely rides through a country, cannot be expected to publish much valuable information concerning it. The inquiry of a moment, the surmises of ingenuity, and the probability of things, can never atone for sound statistical information, practical remarks, and acknowledged facts. It is necessary to enter into details, before we can arrive at a general result—to establish small facts in order to render larger ones certain—to view in detached bodies, as well as collectively, and indeed before we can pretend to decide on the character of a country to collect, compare, and contrast all its advantages and all its disadvantages; and this cannot be done in a moment. A man may have a glimpse, and not a view—he may see, and yet not understand—he may believe, and yet be mistaken. It is from these facts, and

knowing how deep first impressions, however erroneous, sink, that I have been induced to hint at the superficial accounts of preceding tourists; and however exceptionable the remark may be in a general sense, it applies forcibly in a particular one. I allude to some works on the western country now generally read at the eastward—to some who are even referred to as text books—to labours of mercenary pamphleteers, as catchpenny printers, where we are served up with surmises instead of facts, with bloated descriptions instead of simple accounts; and the authors of which, in many instances, know not the countries they describe, and have neither admired the beauties, or shrunk at the deformities, which they picture.” (p. 52.)

“Copy of Instructions for Deputy Surveyors, Received With Letter From Edward Tiffin, North West of the Ohio, Dated July 26, 1815.”

“General Instructions”:

“The courses of all navigable rivers, which may bound or pass through your district must be accurately surveyed and their width taken at those points where they may be intersected by township or sectional lines; also the distance of those points from the sectional corners and from the commencement of any course where you are meandering the River, you will likewise not fail to make special notice of all streams of water which fall in your way with their width and course from whence they appears to come or run.” (p. 8)

“In meandering Rivers you will take the bearings according to the true meridian of the River and note the distance on any course when the River intersects the sectional lines, and the calculations of the contents of the fractions are to be made by the tables of Difference of Latitude and Departure, and returned on your plats; but the quantity of contents of the whole section only are to be put down; in all the other sections, and each of them is to be accounted one mile square or 640 acres, unless your closing lines deviate very much from 80 chains, in which case you will be careful to put down their true length on your plats.” (Par. 7, p. 6)

“Life and Writings of DeWitt Clinton,” by William W. Campbell, Published at New York by Baker and Scribner, in 1849.

“We visited the Adams, a brig of 150 tons and four guns, belonging to the United States, commanded by Commodore Brevoort, who appears to be a worthy officer. This is the only vessel we have on the lakes, and she is employed in transporting military stores. She can make a voyage to Fort Dear-

born, upwards of 1000 miles, on Lake Michigan, and return, in two months. The British have two armed vessels on this lake, one pierced for sixteen, and the other for twelve guns, and a fort to the south-west of Black Rock, called Fort Erie, and garrisoned by a Lieutenant and twenty men.

"Commodore Brevoort says that vessels drawing seven feet water, can at some seasons go from Fort Dearborn to Chaquagy (Chicago) up a creek of that name, and to the Illinois River, whose waters in freshets meet, and so down the Mississippi; he thinks he can effect it in his brig, which draws but six feet when lightened. A brig of 150 tons, sailing from Black Rock to Hudson, would seem incredible." (p. 140)

INTRODUCED BY DEFENDANT.

Letter.
Nov. 29,

Letter of J. W. Woermann, C. E. Civil and Hydraulic Engineer, assistant engineer, United States Army, St. Louis, Missouri, November 29, 1911.

"Dear Sir:—

You will probably recall that during my testimony in the Economy case I offered to look up the original computations on which were based the velocities given in the table on page 41 of House Document No. 263, 59th Congress, 1st Session.

"I expected to take this up promptly, but my regular duties prevented me from doing so. Recently I have gone over the Miscellaneous computations relating to the Ernst Report but I have been unable to find any data which would throw any light on the subject except that the computation for the additional depth required through Joliet was made subsequent to the computation of velocities during high water.

"After considering the matter more carefully I have come to the conclusion that the values given in the published table represent the velocities in the unimproved channel and not after the river has been deepened.

"Please see that this statement is added to the record and oblige,

Yours very truly,
J. W. WOERMANN."

"An Act to Create Sanitary Districts and to Remove Obstructions in the Desplaines and Illinois Rivers:

Sections
23 of
Act to
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Section 7. "The board of trustees of any sanitary district organized under this act shall have power to provide for the drainage of such district by laying out, establishing, con-

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structing and maintaining one or more main channels, drains, ditches and outlets for carrying off and disposing of the drainage (including the sewage) of such district, together with such adjuncts and additions thereto as may be necessary or proper to cause such channels or outlets to accomplish the end for which they are designed in a satisfactory manner; also to make and establish docks adjacent to any navigable channel made under the provisions hereof for drainage purposes, and to lease, manage and control such docks, and also to control and dispose of any water-power which may be incidentally created in the construction and use of said channels or outlets, but in no case shall said board have any power to control water after it passes beyond its channel, waterways, races or structures into river or natural waterway or 95 channel, or water-power or docks, situated on such river or natural waterway or channel; Provided, however, nothing in this act shall be construed to abridge or prevent the State from hereafter requiring a portion of the funds derived from such water power, dockage or wharfage to be paid into the State Treasury to be used for State purposes. Such channels or outlets may extend outside the territory included within such sanitary district, and the rights and powers of said board of trustees over the portion of such channel or outlet lying outside of such district shall be the same as those vested in said board over that portion of such channels or outlets within the said district."

Section 23: * * * "And the Canal Commissioners, if they shall find at any time that an additional supply of water has been added to either of said rivers, by any drainage district or districts, to maintain a depth of not less than six feet from any dam owned by the State to and into the first lock of the Illinois and Michigan Canal at La Salle, without the aid of any such dam, at low water, then it shall be the duty of said Canal Commissioners to cause such dam or dams to be removed. This act shall not be construed to authorize the injury or destruction of existing water-power rights."

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96 "A Narrative of the Captivity and Adventures of John Tanner, (U. S. Interpreter at the Sault De Ste. Marie) During Thirty Years Residence Among the Indians in the Interior of North America. Prepared for the Press by Edwin James, M. D., Editor of an Account of Major Long's Expedition from Pittsburgh to the Rocky Mountains. New York: G. & C. & H. Carvill, 108 Broadway, 1830."

"In an attempt to aid this unfortunate individual in ad-

dressing his countrymen, it seemed desirable to give his narrative, as nearly as possible, in his own words and with his own manner. The narrator himself is not without a share of that kind of eloquence which we meet with among the Indians. (Page 4)

"From Hopkinsville I returned to the house of my step-mother, where I made my preparations to go to the Lake of the Woods. Part of my relatives, who had accompanied me from beyond the Mississippi, had returned to their own homes; but my brother and his wife stayed to travel with me. From my brother Edward's house, near New Madrid, I went again to Jackson, where I was taken sick. My stock of money had now increased, through the voluntary donations of those friendly and charitable people among whom I had passed, to give hundred dollars, and, this being all in silver, would, my brother thought, be the means of exposing me to danger, and bringing me into difficulty, should I travel by myself; he, therefore refused to leave me.

97 "From Jackson we went together to St. Louis where we saw Gov. Clark, who had already given much assistance to my brother in his journeys in search of me. He received us with great kindness, and offered us whatever assistance we might think necessary in accomplishing the object I now had in view, which was, to bring my family from the Indian country. My brother wished to accompany me, and to take a considerable number of men, to aid, if it should be necessary, in taking my children from the Indians; but I went one day to Gov. Clark by myself, and told him he must not listen to my brother, who knew little of the country I was going to visit, or of what was needful to my success in the attempt to bring out my family. In truth, I did not wish my brother, or any other white man, to accompany me, as I knew he could not submit to all the hardships of the journey, and live as I should be compelled to live, in an Indian Lodge, all winter. Furthermore, I was aware that he would be rather an incumbrance than any help to me. Gov. Clark wished to send me to the Lake of the Woods by way of the Upper Mississippi; but I was not willing to go that way, on account of the Sioux, through whose country I must pass. He gave me a Mackinac boat, large enough to carry sixty men, with a sufficient crew, three barrels of flour, two of hard bread, guns, tents, axes, &c., &c. Having prevailed on my brother to return, I set off. The current of the Mississippi, below the Missouri, soon convinced me that my large and heavy boat

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was not well adapted to the nature of my undertaking, and at Portage De Sioux I left it. From this place I proceeded in a small canoe, with two men, to the head of the Illinois River, thence to Chicago." (Page 253)

"As the winter came on, I went to Red River to hunt buffalo, and make dry meat, and early in the spring I started to come to the states. From my first wife I had parted ten years before the time I now speak of; but the urgency of the Indians, and, in part, the necessity of my situation, had compelled me to take another. By this woman I had three children; those by my former wife were not at present in the village. My wife refusing to accompany me, I took the three children and started without her. At Rainy Lake she overtook me, and agreed to accompany me to Mackinac.

"On my way down I was assisted by the North West Company. At Drummond's Island I was disappointed of large presents given me when on my way to the Lake of the Woods, but which, as I did not then wish to take, were promised me on my return. The commanding officer who had shown me so much kindness, had been relieved by another, of a very different character, one who seemed to find no satisfaction in doing anything for any person connected with the Indians. This man refused to see me, or afford me any assistance. By the kindness, however, of Mr. Ermatinger, of the Sault De St. Marie, I was enabled to reach Mackinac.

"Col. Boyd, the Indian agent at that time at Mackinac, called me to him, and wished to hire me a striker in his smith's shop; but not liking the employment, I did not wish to remain. He gave me one hundred pounds of flour, the same quantity of pork, some whiskey, tobacco, &c. There were two vessels about to sail for Chikago, but neither of them would take me as a passenger, though I had money enough, and was willing to pay them. As I had no other alternative, I was compelled to purchase from the Indians a poor and old bark canoe, for which I gave sixty dollars, and I engaged three Frenchmen to accompany me; but Col. B.— would not permit them to go. He gave me, however, a letter to Dr. Wolcott, who was now Indian agent at Chicago, and I started with only one man to assist me.

"At the Ottawwaw settlement of Waw-gun-nuk-kiz-ze I stopped for a short time, and finding that my canoe was too frail and leaky to perform the voyage, I purchased another, a new one, for which I gave eighty dollars. Several of my acquaintances among the Ottawwaws determined to accompany me, and started accordingly, eight men in one canoe, and six

in another, with some women. They went on with me until we arrived within one or two days' journey of Chikago, when meeting other Indians, with discouraging accounts of the state of the water in the Illinois, they left me and went back. My wife returned with them." (Page 255)

1073 "When I arrived in Chikago, I was sick of a fever, and my provisions being exhausted, I was in great distress. I went to Dr. Wolcott to present him the letter from Col. Boyd, the Indian agent at Mackinac, but he would not receive it, nor take any notice of me. He knew well who I was, as he had seen me when I passed through Chikago before, and I could not tell why he refused me assistance. I had my tent set up at a little distance from his house, near a wild rice swamp, and for several days, though I was so much more unwell that I was scarce able to sit up five minutes at a time, I subsisted my children by shooting the black birds as they came and settled on the rice. When I was again able, with the aid of two sticks, to crawl to the house of Dr. Wolcott, I went to represent to him that my children were in danger of perishing of hunger; but he drove me harshly away. When I left his door I shed some tears, which it was not common for me to do; but I was rendered womanish by my sickness. Three or four times I fainted, and lay long by the road side, on the way from his house to my tent. But my sufferings, and those of my children, were shortly afterwards relieved by a Frenchman, who had been to carry some boats across the Portage. His wife was an Ojibbeway woman, and commonly accompanied him when he went to take any boats across. Though his horses were now much worn out with the long journey from which he had returned, he agreed to take me and my canoe sixty miles, and if his horses could hold out, the whole one hundred and twenty, which was, at the present stage of water, the length of the Portage, for which I agreed to pay him agreeable to his demand, which I thought very moderate. He lent me, also, a young horse to ride, as I was far too

1074 weak to think of walking, and he thought I could ride on horseback much more comfortably than in the cart with the canoe. Before we arrived at the end of the sixty miles, he was taken sick, and as there was now a

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little water in the river, I concluded to put my canoe in, and try to descend in it.

His young horse, the night after I gave it up to him, was stolen by the Po-ta-wato-mies. He was seized with the bloody flux, but as he had a young man with him, I rendered him what assistance I could in starting, and let him go back. My Frenchman had deserted me soon after I left Chikago, and I had now no person to assist me except an old Indian, called Gos-so-kwaw-waw, (the smoker). We put the canoe in the water, but we could not get into it ourselves, only sometimes the children were put in, and we took them down, one walking at the bow, the other at the stern of the canoe. We had proceeded no more than three miles, when I found that this method was likely to prove so laborious and slow, that I thought best to engage a Po-ta-wato-mie, whom I met
1075 there, and who agreed for a blanket and a pair of leggins, to take my baggage and my children on his horses to the mouth of the An-num-mum-ne-Se-be, or Yellow Ochre River, a distance of sixty miles. The An-num-mun-ne comes from towards the Mississippi, and below it there is always, in the Illinois, water enough for canoes. I felt somewhat afraid to trust the Po-ta-wato-mie with my children, and the baggage, which contained some valuable property, but old Gos-so-kwaw-waw was of opinion that he would prove honest. When he put the children on the horses, he said, 'In three days I shall be at the mouth of the An-num-mun-ne River, and shall wait for you there.'

Without any farther words, we parted, and the old Smoker and myself continued our laborious and difficult route along the bed of the Illinois. Most of the country, on both sides the route, from Chikago to the Yellow Ochre River, are prairie, in which horses and carts can be driven without any difficulty. On our arrival at the place appointed, we found the Po-ta-wato-mie there, and all safe.

We now embarked every thing together in the canoe, and went down to Fort Clark, which is on a narrow neck of land, between two lakes, and is thence called by the Indians Ka-gah-gum-ming.

1076 At Cape Guirardeau, where I left my canoe, and where I remained but a very short time, I saw some of the gentlemen of Major Long's party, then on their return from the Rocky Mountains. This was in the fall of the year 1820, and was about one year after my first arrival on the Ohio in 1819. From the time of my capture by Manito-o-geezhik and Gish-kaw-ko, just thirty years had elapsed, before I started in the spring of 1819, from the Lake of the Woods. So that it must have been in the spring of the year 1789, that I was taken prisoner. I am now forty-seven years old.

"A Narrative
of the Captures
and Adventures of
Tanner."

In the spring of 1822, I started to go again to the north, not finding that I was content among my friends in Kentucky. I went by way of the Grand Prairie, and having given my canoe to my brother, I took horses, and putting my children on them, I came to St. Louis, thence by way of the Illinois, towards Chikago.

The Indian agent for Fort Clark lived at this time at a place called Elk Heart, some distance below. He, as well as most of the people on this route, had been kind, and had shown a disposition to assist me whenever I needed any thing. On this journey I stopped at Elk Heart, at the house of the agent, and though he was not himself at home, I had my horses fed, and was supplied with what refreshment I needed for myself and children, free of expense. On the following day, I met the agent 1077 on his way home from Fort Clark, and told him of the reception I had met at his house in his absence. He was glad to hear of this, and he told me that I should soon come to a bad river to cross; 'but' said he, 'there is a boat now on this side, in which I have just crossed. The man to whom it belongs, lives on the other side. You must use the boat to cross, and then tell him to take it around to the other river, which is beyond his house, and help you to cross that, and I will pay him for his trouble.' We crossed accordingly, but my daughter Martha being now sick, we stopped all day near the house of the man to whom the canoe belonged. I had one very handsome horse, which had been given me by my brother, and which this man said he was determined to have from me. He offered to buy it; but I told him the horse was necessary to my journey, and I could by no means part with it.

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Still he insisted, and said, unless I would let him have the horse, I should not have his canoe to cross the other river. He cursed and abused me, but all the means he could use, did not induce me to give up the horse. The canoe had been taken around to the river I had to cross, for the use of some other person, and when I was ready to go I started, expecting to find it there. But on my way to the ferry, I met the man on horseback, who said to me, 'I have taken away the canoe, and you cannot cross.' Without regarding this, I went on, and when I arrived, I found the canoe was indeed gone, and that there were no logs, or other materials to make a raft. Fearing to endanger the children, by swimming them across on the 1078 horse's backs, I stood for some time in doubt what to do. At last I recollected, that if he had hid the canoe, as was most probably the case, his track would lead me to it. Then going back to the road, a considerable distance from the river, I found his track coming into it. This I followed, until I found the canoe hid in thick bushes, about a mile below the ferry. Taking it up to the crossing place, I carried my children, and led the horses over; then giving the canoe a push into the stream, I said to it, 'go, and stay where your master hides you.' "

(Endorsed) United States Circuit Court of Appeals For the Seventh District Economy Light and Power Co. a Corporation, Appellant, vs. United States of America, Appellee. Stipulation. Filed Feb 8—1918 Edward M. Holloway, Clerk

100 Defendant's Exhibits 1, 2, 3, and 4 introduced in evidence March 20, 1915.

State of Illinois }
Grundy County. } ss.

IN THE CIRCUIT COURT THEREOF

To the March Term, 1908.

To the Honorable the Judges of the Circuit Court of Grundy County, In Chancery Sitting:—

102 William H. Stead, the Attorney General of the State of Illinois, who sues for the People of the said State of Illinois in this behalf, and at the relation of Charles S. De-
neen, Governor of the State of Illinois, comes now here, and in the name and by the authority thereof, gives this Honorable Court to understand and be informed, as follows, to wit:

I. That the said People of the State of Illinois, by their said Attorney General, bring this their suit against The Economy Light and Power Company, a corporation, duly organized under the laws of the State of Illinois, and having its principal office and place of business at the City of Chicago, in the County of Cook and State of Illinois.

II. That in the early history of our country a certain territory embracing what is now the States of Ohio, Indiana, Illinois, Michigan and Wisconsin, was claimed to be owned by Virginia, and that afterwards, by certain Acts of the Legislature of Virginia, and by its deed of cession, bearing date the first day of March, A. D. 1784, said territory was conveyed to the United States, and that afterwards, and, to wit, on the 13th day of July, A. D. 1787, the Congress of the United States, then existing under the Articles of Confederation, enacted a certain ordinance entitled, "An Ordinance for the Government of the Territory of the United States Northwest of the River Ohio," and which said Act was and is commonly known as the ordinance of 1787. That among other provisions of said ordinance of 1787, Section 14 thereof contains the following:

103 "It is hereby ordained and declared, by the authority

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aforesaid, that the following articles shall be considered as articles of compact, between the original States and the people and States in the said territory, and forever remain unalterable, unless by common consent, to wit, * * * Article 4. * * The navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States and those of any other States that may be admitted into the Confederacy, without any tax, impost duty therefor."

That afterwards, and on, to wit, the 18th day of May, 1796, said Congress of the United States passed a certain statute entitled, "An Act providing for the sale of the lands of the United States in the territory northwest of the River Ohio and above the mouth of the Kentucky River, and by Section 9 thereof provided as follows:

"Sec. 9. And be it further enacted that all navigable rivers within the territory to be disposed of by virtue of this Act, shall be deemed to be and remain public highways."

That thereafter, and to wit, by a statute duly passed by the Congress of the United States on the 7th day of May, 1800, entitled, "An Act to divide the territory of the United States northwest of the Ohio into two separate Governments," there was divided and set apart from said Northwestern territory a certain portion thereof which embraces all of what is now the State of Indiana and the State of Illinois, and provided the same should constitute a separate territory, to be called the Indiana Territory.

104 That thereafter the Congress of the United States, acting under the constitution of 1789, for the further government of certain portions of the said Northwestern Territory, and on, to wit, the 26th day of March, 1804, duly passed a certain statute entitled, "An Act making provision for the disposal of the public lands in the Indiana Territory, and for other purposes"; and by Section 6 thereof, it was provided that "All the navigable rivers, creeks and waters within the Indiana Territory shall be deemed to be and remain public highways."

That afterwards the Congress of the United States, by its Act of February 3, 1809, entitled "An Act for Dividing the In-

diana Territory into two separate Governments," provided, among other things, that that portion of the said Indiana Territory which now comprises the State of Illinois, for the purposes of temporary government, should constitute a separate territory to be called Illinois; and that among other and further provisions in said Act it is provided:

"That there shall be established within the said territory a government in all respects similar to that provided by the ordinance of Congress passed on the 13th day of July, 1787, for the government of the territory of the United States, northwest of the River Ohio; and by an Act passed on the 7th day of August, 1789, entitled 'An Act to provide for the Government of the Territory Northwest of the River Ohio'; and the inhabitants thereof, shall be entitled to and enjoy all and singular the rights, privileges and advantages, granted and secured to the people of the Territory of the United States northwest of the River Ohio by said ordinance.

That afterwards, and, on to wit, the 18th of April, 105 1818, the Congress of the United States enacted another statute, entitled "An Act to enable the people of Illinois to form a constitution and State Government, and for the admission of such State into the Union, on an equal footing with the original States," which statute contains the following provision:

"Sec. 4. And be it further enacted * * * Provided, that the same, whenever formed, shall be republican, and not repugnant to the ordinance of the 13th of July, 1787, between the original States and the people and States of the territory northwest of the River Ohio, excepting so much of said articles as relates to the boundaries of the States therein to be formed: * * *"

That afterwards the people of the Illinois territory duly adopted the constitution known as the Constitution of 1818, the preamble of which contains the following, to wit:

"The people of the Illinois Territory, having the right of admission into the general government as a member of the Union, consistent with the Constitution of the United States, the Ordinance of Congress of 1787, and the law of Congress, approved April 18, 1818, entitled 'An Act to enable the people of the Illinois Territory to form a Constitution and State government, and for the admission of such State into the Union on an equal footing with the original States, and for other purposes'; in order to establish justice, promote the wel-

Defendant's
Exhibit 2.

fare and secure the blessing of liberty to themselves and their posterity, do, by their Representatives in convention, ordain and establish the following Constitution or form of government and do mutually agree with each other to form themselves into a free and independent State, by the name of the State of Illinois."

That afterwards, and, to wit, on December 3rd, 1818, the Congress of the United States adopted a certain resolution entitled, "Resolution declaring the admission of the State of

Illinois into the Union," which declared, among other 106 things, that the "Constitution and State government, so formed, is republican, and in conformity to the principles of the articles of compact between the original States and the people and States in the territory northwest of the River Ohio, passed on the 13th day of July, 1787. * * *"

III. That the River Desplaines is situated in said territory, and rises in what is now the State of Wisconsin, and flows in a southerly direction into the State of Illinois, and through the Counties of Lake and Cook and between Du Page and Cook Counties therein, and through the County of Will and into Grundy County, in all a distance of about 96 miles.

That the River Kankakee rises in Indiana and flows westerly therefrom into Illinois through Kankakee and Will Counties and into Grundy County therein, where it unites with the Desplaines River, and with the said Desplaines River forms the Illinois River, which last named river flows thence westerly and southwesterly through several counties of Illinois into the Mississippi River. Wherefore and by reason whereof your orators charge the fact to be that the Desplaines River is wholly within the territory originally comprising what was known as the Northwestern Territory, and that the same empties its waters into the Mississippi River, and, by reason of the facts hereinafter set forth, is subject to the provisions of the said Acts of Congress.

107 IV. Your orators further show unto your Honors that it is shown by the history of the explorations and discoveries of the territory in what is now the northern part of Illinois, that at the time of the explorations and discoveries, the Desplaines River was navigable from a point near where is now situated the City of Chicago, in the State of Illinois, to the mouth of said Desplaines River, in what is now Grundy County, Illinois; that by the same history it is shown that the portion of the Desplaines River last above mentioned was used in the early period of the State of Illinois as highway

for commercial purposes; that commerce was carried on over said river and over the Chicago River, located in Cook County, Illinois, and connection therewith made by a short portage between the two rivers near the site of what is now the City of Chicago, Cook County, Illinois, and was in use as the highway of commerce, leading from Lake Michigan and the waters emptying into the St. Lawrence River on the one hand, to the Illinois River and the waters of the Mississippi River on the other hand, thenceforward from the time of said first use up to and at the time when the said ordinance of 1787 and the several acts of Congress were respectively enacted.

That afterwards the State of Illinois, by and through the Legislature thereof, and in obedience to the several acts of Congress hereinbefore set forth, assumed and took charge

of the said Desplaines River, and in the exercise of its control over the said Desplaines River, did by its certain act, entitled, "An Act to authorize the building of a bridge across the Desplaines River," approved and in force February 19, 1839, gave permission for the building of a toll bridge across the Desplaines River, on the northeast quarter of Section number eleven (11), in township number thirty-nine (39) north, in Range number twelve (12), east of the Third Principal Meridian; and also, by the same act, permission was given to build another bridge across the same river, on the southeast quarter of Section number two (2) in the same Town and Range last above mentioned; and that afterwards the Legislature of the State of Illinois passed a certain law, entitled, "An Act to amend the several laws in relation to the Illinois and Michigan Canal," in force February 26, 1839, which contain. among other provisions, the following, to wit:

"Sec. 2. Sub-section 9. That no stream of water passing through the canal lands shall pass by the sale so as to deprive the State from the use of such water if necessary to supply the canal without charge for the same.

And that Sub-section 11 of said Section 2 of said Act is in the words as follows, to wit:

"Sub-Sec. 11. Lands situated upon streams which have been meandered by the surveys of public lands by the United States should be considered as bounded by the lines of those surveys, and not by the streams."

109 That afterwards the Legislature of the State of Illinois, by its certain laws then passed, entitled, "An Act declar-

ing the Desplaines River a navigable stream," approved and in force February 28th, 1839, provided as follows:

"Sec. 1. Be it enacted by the people of the State of Illinois, represented by the General Assembly, That the Desplaines River from the point where it most nearly connects itself with the Illinois and Michigan Canal to its source within the boundaries of this state, is hereby declared a navigable stream, and shall be deemed and held a public highway, and shall be and remain free, open and unobstructed from said point of connection with said canal to its utmost limit within this state for the passage of all boats and water crafts of every description";

And that afterwards the Legislature of the State of Illinois, by its statute passed and in force March 3, 1845, entitled "An Act to authorize Stephen Forbes to construct a dam across the Desplaines River in Cook County", provided as follows, to wit:

"Sec. 1. Be it enacted by the People of the State of Illinois, represented by the General Assembly, that Stephen Forbes, or his heirs and assigns, be, and they are hereby authorized to construct, build and continue a mill dam across the Desplaines River, on the south west quarter of Section thirty-six (36) in Township No. thirty-nine (39) North of Range twelve (12), east, and on the northeast quarter of Section two (2), Township No. thirty-eight (38) North of Range twelve (12), east, in the County of Cook in this state; provided that this act shall not operate to prevent the state from improving said river by dams, or from using the water in said river for the Illinois and Michigan Canal at any time hereafter, or for any other purpose; provided, that he shall be liable for any damage to any individual in consequence of the erection of such dam."

And that afterwards the Legislature of the State of Illinois, by its certain law, entitled, "An Act authorizing the building of a bridge and road in Township 36 North, Range 10, east, in Will County," approved and in force February 12, 1849, authorized the construction of a bridge over the Desplaines River at Lockport in Will County, Illinois.

That afterwards the Legislature of the State of Illinois, by its certain act, entitled "An Act to create sanitary districts and to remove obstructions in the Des Plaines and Illinois Rivers," approved May 29th, 1889, in force July 1, 1889, among other things provided as follows:

"Sec. 23. If any channel is constructed under the provisions hereof by means of which any of the waters of Lake

Michigan shall be caused to pass into the Des Plaines or Illinois Rivers, such channel shall be constructed of sufficient size and capacity to produce and maintain at all times a continuous flow of not less than three hundred thousand cubic feet of water per minute, and to be of a depth of not less than fourteen feet, and a current not exceeding three miles per hour, and if any portion of any such channel shall be cut through a territory with a rocky stratum where such rocky stratum is above a grade sufficient to produce a depth of water from Lake Michigan of not less than eighteen feet, such portion of said channel shall have double the flowing capacity above provided for, and a width of not less than one hundred and sixty feet at the bottom capable of producing a depth of not less than eighteen feet of water. If the population of the district drained into such channel shall at any time exceed one million five hundred thousand, such channel shall be made and kept of such size and in such condition that it will produce and maintain at all times a continuous flow of not less than twenty thousand cubic feet of water per minute for each one hundred thousand of the population of such district, at a current of not more than three miles per hour, and if at any time the general government shall improve the Des Plaines or Illinois rivers, so that the same shall be capable of receiving a flow of six thousand cubic feet of water per minute, or more, from said channel, and shall provide for the payment of all damages which any extra flow above three hundred

thousand cubic feet of water per minute from such channel may cause to private property so as to save harmless the said district from all liability therefrom, then such sanitary district shall within one year thereafter, enlarge the entire channel leading into said Desplaines and Illinois Rivers from said district to a sufficient size and capacity to produce and maintain a continuous flow throughout the same of not less than six hundred thousand cubic feet of water per minute with a current of not more than three miles per hour, and such channel shall be constructed upon such grade as to be capable of producing a depth of water not less than eighteen feet throughout said channel, and shall have a width of not less than one hundred and sixty feet at the bottom. In case a channel is constructed in the Des Plaines River as contemplated in this section it shall be carried down the slope between Lockport and Joliet to the pool commonly known as the upper basin, of sufficient width and depth to carry off the water the channel shall bring down from above. The district constructing a channel to carry water from Lake Michigan

of any amount authorized by this Act may correct, modify and remove obstructions in the Des Plaines and Illinois rivers wherever it shall be necessary so to do to prevent overflow or damage along said river, and shall remove the dams at Henry and Copperas creek in the Illinois River, before any water shall be turned into the said channel.

And the canal commissioners, if they shall find at any time that an additional supply of water has been added to either of said rivers, by any drainage district or districts, to maintain a depth of not less than six feet from any dam owned by the State to and into the first lock of the Illinois and Michigan canal at La Salle, without the aid of any such dam, at low water, then it shall be the duty of said canal commissioners to cause such dam or dams to be removed. This act shall not be construed to authorize the injury or destruction of existing water power rights.

And also in the same Act it is provided:

"Sec. 24. When such channel shall be completed and the water turned therein, to the amount of 300,000 cubic feet of water per minute, the same is hereby declared a navigable stream, and whenever the general government shall improve the Des Plaines and Illinois rivers for navigation, to connect with this channel, said general government shall have full control over the same for navigation purposes, but not to interfere with its control for sanitary drainage purposes."

112 That afterwards the Legislature of the State of Illinois on the 14th day of May, 1903, enacted a certain statute which became in force on the 1st of July, 1903, entitled, "An Act on relation to the sanitary district of Chicago, to enlarge the corporate limits of said district, and to provide for the navigation of the channels created by such district, and to construct dams, water wheels and other works necessary to develop and render available the power arising from the water passing through its channels, and to levy taxes therefor," which said Act contained, among other things, the following provisions, to wit:

"Sec. 3. Said Sanitary District shall permit all water craft navigating or purporting to navigate said Illinois and Michigan Canal, to navigate the water of all said channels of said Sanitary District promptly, without delay and without the payment of any tolls or lockage charges for so navigating in said channels. The rules of the United States Government now in force, regulating navigation on the Chicago River, shall govern navigation on the channels of said Sanitary District of Chicago;

Provided, however, that the speed of all vessels while passing through the earth sections shall not exceed eight miles per hour.

"Sec. 8. The said Sanitary District shall, at the expense of said district, in all respects comply with the provisions of the Act of Congress of March 22, 1822, and March 2, 1827, as construed by the courts of last resort of the State of Illinois, and of the United States in relation to the Illinois and Michigan Canal so far as it affects that portion of the Illinois and Michigan Canal vacated or abandoned in the terms of this act."

And your orators show that after the passage of the said statute of May 29th, 1889, a Sanitary District was formed in pursuance thereof, known as the Sanitary District of Chicago, and said Sanitary District of Chicago has constructed a channel substantially in compliance with the provisions of said statute. That said channel begins at a point of junction with the Chicago River in the City of Chicago and extends southwesterly through the County of Cook into the County of Will, where it connects with a stream which empties its waters into the Desplaines River, and is now and for several years last past has been discharging into said Desplaines River at a point north of Joliet in Will County, a body of water drawn from Lake Michigan through the Chicago River and through said drainage channel, amounting to about 300,000 cubic feet of water per minute, and your orators show that said body of water mingles with the waters of the Desplaines River, and flows thenceforward through the course of the Desplaines River to the mouth of said river, on Section number twenty-five (25) Town number thirty-four (34) North, Range number eight (8) East of the Third (3rd) Principal Meridian in Grundy County.

That afterwards the Legislature of the State of Illinois enacted its certain statute, and the same became in force by approval from and after the 6th day of December, 1907, as follows, to wit:

"A Bill for an Act recognizing the Des Plaines and Illinois Rivers as navigable streams and to prevent obstructions being placed therein, and remove obstructions therein now existing.

Section 1. Be it enacted by the People of the State of Illinois, represented in the General Assembly: That the Des Plaines and Illinois Rivers throughout their courses from and below the water power plant of the main channel of the

Sanitary District of Chicago in the township of Lock-
114 port, at or near Lockport, in the County of Will, are
hereby recognized as and are hereby declared to be navigable streams; and it is made the special duty of the Governor and of the Attorney General to prevent the erection of any structure in or across said streams without explicit authority from the General Assembly; and the Governor and Attorney General are hereby authorized and directed to take the necessary legal action or actions to remove all and every obstruction now existing in said rivers that in any wise interferes with the intent and purpose of this Act.

Sec. 2. Whereas an emergency exists: this Act shall be in force and effect from and after its passage."

That the relator, Charles S. Deneen, is the Governnor referred to in said statute, and that he by virtue and reason of said statute and in the direction therein contained, as well as by virtue of his office as Governor, and his constitutional duty to take care that the laws be faithfully executed, has a special interest and responsibility in the matters herein set forth.

Your orators further show that the Des Plaines River has, from the time when said ordinance of 1787 was passed by the Congress of the United States unto the present time, formed in its ordinary condition, and by itself, to the extent of its course, from the point of said portage and connection with the Chicago River in Cook County, Illinois, to its mouth in Grundy County, Illinois, and then forward by uniting with the said Illinois River, a continued highway with water in sufficient volume and of sufficient depth to afford a channel for navigable and commercial purposes.

Wherefore and by reason whereof your orators charge the fact to be that the Desplaines River from near the City
115 of Chicago, in Cook County, Illinois, to the mouth of said river in Grundy County, Illinois, has been from the earliest knowledge of said river until the present time in law and in fact a navigable river, and that the several acts of the Legislature hereinbefore recited show the fact to be that it has been and is the policy of the State of Illinois to hold and maintain said Desplaines River to be a navigable river, and so being a navigable river both in law and in fact, said river is subjected to the provisions of the several acts of Congress hereinbefore set forth, and by reason whereof the said Desplaines River has been and still continues to be a highway of commerce, and as such is preserved for the use of the people of the State of Illinois, and the people of all the states of the United States as a public highway, and has not been alienated

from the rights of the people as a public highway, and that the People of the State of Illinois and of the United States have an easement over said river as a public highway for commerce, and that said river and the bed and waters thereof are permanently impressed and burdened with said easement and with a public right and public use of navigation.

V. Your orators further represent unto your Honors that by an Act of Congress of the United States, approved March 2, 1827, the Congress of the United States granted to the State of Illinois every alternate section in a strip of land ten miles wide along the line of the Illinois and Michigan Canal for the purpose of aiding the opening of a canal to connect the waters of the Illinois River with those of Lake Michigan, and that among the lands thus conveyed by the Congress of the United States to the State of Illinois, in Section number twenty-five (25), in Township number thirty-four (34) North, in 116 Range eight (8), East of the Third (3rd) Principal

Meridian, in Grundy County, Illinois. That the Legislature of the State of Illinois, in the exercise of its power and control over said lands, last above described, and other lands received from the Congress of the United States, as above stated, by its certain Act entitled, "An Act to amend the several laws in relation to the Illinois and Michigan Canal," in force February 26, 1839, enacted the following provision, to wit:

"Section 2. Sub-Sec. 11. Lands situated upon streams which have been meandered by the surveys of public lands by the United States shall be considered as bounded by the lines of those surveys and not by the streams."

That the Desplaines River and the Kankakee River unite and form the Illinois River in the southeast quarter of said Section number twenty-five (25) in Township number thirty-four (34) North, in Range number eight (8), East of the Third (3rd) Principal Meridian, in Grundy County aforesaid, and that, by the survey of public lands by the United States said Desplaines River was meandered.

Your orators are informed and believe and upon such information and belief charge the fact to be, that the purchasers from the State of Illinois of lands in said Section twenty-five (25), above described, and other similarly situated lands with reference to the Desplaines River, did not take, and did not claim to take under their several purchases that portion of said lands lying between the meander line of the Desplaines River and the waters of said river; and that said lands between said meander line and the water of said Desplaines

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River have never been used by any individual, under any claim of authority or right vested in said purchasers of said lands from the State of Illinois, save and except as 117 claimed by the defendant. Wherefore, and by reason whereof, your orators charge the fact to be that the lands lying between the meander line of the Desplaines River and the waters of said river, in the southeast quarter of said section number twenty-five (25), in Township number thirty-four (34) North, in Range number eight (8), East of the Third (3rd) Principal Meridian, in Grundy County, Illinois, together with the bed of the stream of the said Desplaines River, in said quarter section of land last described above, and other lands similarly situated with reference to the Desplaines River, have not passed by any purchase of adjoining lands from the State of Illinois, and that the same, and each and every part thereof, is owned by the State of Illinois, and held by said State for the use and benefit of the people of the State of Illinois, and of the People of the United States, as a public highway for commerce.

VI. Your orators further state unto your Honors that the Trustees of the Illinois and Michigan Canal executed and delivered to one Chas. E. Boyer, a deed bearing date as of the 22nd day of October, 1860, for certain tracts of land described therein as follows, to wit:

"The south fraction of the northwest quarter, and the north fraction of the southeast quarter, and the north fraction of the northwest quarter, and the south fraction of the southeast quarter of said Section 25, in Township 34 North, of Range 8, East of the Third Principal Meridian, excepting and reserving so much of said tract as is occupied by the 118 canal and its waters, and a strip 90 feet wide on either side of said canal, containing 196.62 acres, more or less, said tract being a portion of the land granted by the United States by the Act of March 21, 1827, and the 28th day of August, 1854, to the State of Illinois, to aid said State in opening a canal to connect the waters of the Illinois River with those of Lake Michigan, and by said State granted to the said Board of Trustees of the Illinois and Michigan Canal for the purposes set forth in said Act of said State of February 21, 1843."

And your orators further state unto your Honors that the legislature of the State of Illinois, by its certain Act approved and in force February 26, 1839, enacted as follows, to-wit:

"Sec. 2. Sub-Sec. 9. That no stream of water passing through canal lands shall pass by the sale so as to deprive

the State from the use of such water if necessary to supply the canal without charge for the same."

Defendant's
Exhibit

"Sec. 2, Sub-Sec. 11. Lands situated upon streams which have been meandered by the surveys of public lands by the United States shall be considered as bounded by the lines of those surveys and not by the streams."

Wherefore your orators charge that no part of the land in the northwest quarter and in the southeast quarter of said section number twenty-five (25), in Town thirty-four (34) North, in Range eight (8), east of the Third (3rd) Principal Meridian, lying and being situated outside of the meander line of the Desplaines River, were conveyed by said deed to the said Charles E. Boyer, and that the same remain the property of the State of Illinois.

And your orators further state that the claim of the defendant, the Economy Light and Power Company, to said portion of said premises so situated outside of the meander lines of the Desplaines River, and in said Section number Twenty-five (25), is based upon mesne conveyances from the said Charles E. Boyer, and the several contracts and leases hereinafter set forth.

VII. That on March 2, 1827, the Congress of the United States passed a certain Act entitled

"An Act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," in which, among other things, it was provided as follows:

"That there be, and hereby is, granted to the State of Illinois, for the purpose of aiding the said State in opening a canal to unite the waters of the Illinois River with those of Lake Michigan, a quantity of land equal to one-half of five sections in width, on each side of said canal, and reserving each alternate section to the United States, to be selected by the Commissioner of the Land Office, under the direction of the President of the United States, from one end of said canal to the other; and the said lands shall be subject to the disposal of the legislature of the said State, for the purpose aforesaid, and no other."

That in and by said Act of March 2, 1827, said Congress granted, by implication, the right of way for the construction of said canal through the sections of public lands which were not donated to the State in aid of said canal; and that the said grant of right of way by implication extended to the land necessary to be used for the canal of the width contemplated.

That afterwards such proceedings were had, pursuant to

law and to said statute, that the route and location of said canal were duly surveyed and laid out, and the odd numbered sections of lands upon the survey of the same as Public Lands by the Surveyor General of the United States bordering said canal and within five miles on each side of said canal, commencing with Township number thirty-two (32) North of Range number one (1), East of the Third (3rd) Principal Meridian, were duly selected, by said Commissioner of the Land Office, under the direction of the President of the United States (except 21 exterior sections, not now involved), the said selections as confirmed included said Section 25, Township 34 North, Range 8, East of the Third Principal Meridian, and Sections 31, 29, 21, 15, 11, all in Township 34, North, Range 9, East of the Third Principal Meridian, and Sections 31, 29, 21, all in Township 35 North, Range 10, East of the Third Principal Meridian, and said Board of Commissioners of the Illinois and Michigan Canal laid out said canal, through said last named sections, and began the construction thereof, and provided for the reservation of a 90-foot strip of land on each side thereof for use as a tow path and as part of the canal throughout the length thereof.

That afterwards, in the years 1847 and 1848, Artemus J. Matthewson, a surveyor and engineer, under the authority and direction of the Canal Trustees herein elsewhere referred to, surveyed and marked the lines of a 90-foot strip on each side of the canal as finally located and constructed from one end thereof to the other, and prepared and filed in the office of said Board of Trustees maps and profiles of said survey, and the said 90-foot strip so laid off and surveyed by said Matthewson on each side of the canal as aforesaid, was reserved from sale by the Canal Commissioners and Canal Trustees in sales of canal lands in said odd numbered sections, and title thereto remains in the State of Illinois; and said strip, together with the lands necessary for right of way through the alternate even numbered sections of land through which said canal was constructed, constitute integral parts of the said canal, and are necessary for its preservation and use, and are, by law, preserved and protected against alienation; and said 90-foot strip was so expressly reserved from sale in said deed by said Trustees of the Illinois and Michigan Canal to said Charles E. Boyer.

VIII. Your orators further represent unto your Honors that the Canal Commissioners of the State of Illinois entered into a certain contract, bearing date as of the 2nd day of September, 1904, with one Harold F. Griswold, and

which said contract, as your orators are informed and believe, and upon such information and belief charge the fact to be, was, by the said Harold F. Griswold, assigned, so that by mesne assignments the same was purported to pass to The Economy Light & Power Company, the defendant in this cause, a copy of which said contract is hereto attached and marked Exhibit A, and hereby made a part of this bill.

And your orators further state unto your Honors that they are informed and believe, and upon such information and belief charge the fact to be that the said Canal Commissioners entered into a contract of lease with one Harold F. Griswold as of the date of the 2nd day of September, 1904, a copy of which said lease is hereto attached and marked Exhibit B, and hereby made a part of this bill; and which said lease was, as your orators are informed and believe, assigned by the said Harold F. Griswold, so that by mesne assignments the same was purported to pass, to The Economy Light & Power Company.

And your orators further inform the Court that they are informed and believe, and upon such information and belief charge the fact to be, that the Canal Commissioners entered into another certain contract with the said Harold F. Griswold as of the date of the 8th day of August, 1905, a copy of which said contract is hereto attached and marked Exhibit C, and hereby made a part of this bill, and which

said contract was, as your orators are informed and believe, assigned by the said Harold F. Griswold, so that by mesne assignments the same was purported to pass to The Economy Light & Power Company.

Your orators further state unto your Honors that the Canal Commissioners of the State of Illinois made an application to the Governor of the State of Illinois for his consent to the sale of certain lands, and which said application bears date as of the 11th day of June, 1904, a copy of which said application is hereto attached, marked Exhibit D, and hereby made a part hereof; and that a copy of the approval of said application for said sale by the Governor of the State of Illinois, as of the date of the 14th day of June, 1904, is hereto attached and marked Exhibit E, and hereby made a part of this bill.

And your orators further state unto your Honors that in pursuance of said application for sale, and the approval of said application by the Governor, as aforesaid, there was inserted in the Lockport Phoenix-Advertiser, a newspaper of general circulation, printed and published in the village of Lockport, in the County of Will, and State of Illinois, a cer-

Defendant's
Exhibit

tain notice of said proposed sale, a copy of which said notice, together with the certificate of publication thereof, is hereto attached and marked Exhibit F, and hereby made a part of this bill.

And your orators further state unto your Honors that 124 in and by said notice last above mentioned, the premises therein described were advertised to be sold on the 2nd day of August, 1904, at 10 o'clock in the morning for cash, at the Canal office in Lockport, Will County, in the State of Illinois; and your orators further state that no sale of said premises occurred on the 2nd day of August, 1904, in pursuance of said notice, but that the sale so advertised to be made was adjourned, and never thereafter resumed.

Your orators further represent unto your Honors that after the 2nd day of August, A. D. 1904, and under date of September 2, 1904, the Canal Commissioners of Illinois entered into the agreement and lease hereinbefore mentioned, and marked respectively Exhibits A and B, and that afterwards, and, to wit, under date of November 1, 1904, the Canal Commissioners of the State of Illinois made an application to the Governor of the State of Illinois for his consent to the sale of certain lands in said application described, a copy of which application is hereto attached and marked Exhibit G, and hereby made a part of this bill; and that the approval of said application for sale by the Governor of the State of Illinois was made in writing, a copy of which said approval, bearing date as of the 2nd day of November, 1904, is hereto attached and marked Exhibit H, and hereby made a part of this bill. That in pursuance of said application and approval a notice of sale was inserted in the Lockport Phoenix-Advertiser, 125 a weekly newspaper of general circulation, a copy of which said motion, together with the certificate of publication thereof, is hereto attached and marked Exhibit I, and hereby made a part of this bill.

And your orators further state that in pursuance of said application last above mentioned for the sale of certain lands, and the approval of the Governor thereof, and of the advertisement in the Lockport Phoenix-Advertiser last above mentioned, the said Canal Commissioners, as your orators are informed and believe, and upon such information and belief charge the fact to be, sold, and executed a certain deed to Harold F. Griswold as of the date of the 6th day of January, 1905, a copy of which said deed is hereto attached and marked Exhibit J, and hereby made a part of this bill; and, as your orators are informed and believe, the said Harold F. Griswold

conveyed said premises, so that by mesne conveyances the same were purported to pass to The Economy Light & Power Company, the defendant in this cause.

Defendant
Exhibit

Your orators further state unto your Honors that they are informed and believe, and upon such information charge the fact to be that the said Canal Commissioners entered into a contract of lease with Harold F. Griswold as of the date of September 2nd, 1904, a copy of which said lease is hereto attached and marked Exhibit K, and hereby made a part of this bill, and which said lease, as your orators are informed and believe, was assigned by the said Griswold, so that by mesne assignments the same were purported to pass to The Economy Light & Power Company, the defendant herein.

And so it is, as your orators are informed and believe, 126 and upon such information and belief charge the fact to

be, that the said Economy Light & Power Company, claiming to act by pretended right, authority and virtue of the several deeds, leases and contracts hereinbefore mentioned, claims the right to construct a dam across the Desplaines River and across certain lands adjacent thereto, and across the 90-foot strip of land so used for canal purposes, and immediately adjoining the waterway of the said Illinois and Michigan Canal, and upon the bank or tow path of the said Illinois and Michigan Canal, and so to construct said dam as to flood the lands along the Desplaines River for a distance of several miles, to wit, the distance of ten miles, or thereabouts, above the location of said proposed dam, and which said location of said proposed dam is on the southeast quarter of Section No. 25 in Township No. 34 North, in Range No. 8 East of the Third Principal Meridian, in Grundy County, Illinois, and that in pursuance of said claim of right on its part said Economy Light and Power Company has commenced the construction of a dam across said Desplaines River and across the lands as hereinbefore set forth, but your orators aver that the said several leases, deeds and contracts are ineffectual to confer any right to build or maintain said dam.

Your orators further state unto your Honors that the General Assembly of the State of Illinois has, by its proper resolution, duly passed by the Senate and concurred in by the House of Representatives of said General Assembly on, to wit, the 16th day of October, 1907, a copy of which is hereto attached, marked Exhibit L, and made a part hereof, proposed the building of a deep waterway, commencing at the southern end of the Chicago Drainage Canal and extending

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southwesterly along the line of the Desplaines and Illinois rivers, in accordance with plans and specifications formulated by the corps of engineers of the United States Army, under and by direction of a certain Act of the Congress of the United States; and that the proposition so proposed by the legislature of the State of Illinois has been authorized by the said legislature of Illinois to be submitted to a vote of the people of the State of Illinois, authorizing the construction of said deep waterway, and if the same is built, as an incident thereto, locks and dams, with special provisions for navigation, and securing and safe guarding the passage of boats, will necessarily be constructed across said deep waterways in the channel of the Desplaines River at or near the said southeast quarter of Section number 25, in township number 34 north, in range number 8 east of the Third Principal Meridian in Grundy County, Illinois, which said dam will incidentally afford water power of great value, to wit of the value of several millions of dollars to the State of Illinois, and which said water power, so necessarily incidentally created, will be lost to the State of Illinois if the said Economy Light and Power Company, the defendant herein, shall be permitted to construct the dam herein mentioned.

And your orators deny the right and authority of the Trustees of the Illinois and Michigan Canal, or of the Canal Commissioners of the State of Illinois, to convey the lands composing the bed of the stream of the Desplaines River, or any part or portion of the lands of said section number 25 last above described, outside of the meander line of the Desplaines River.

And your orators further charge that the ninety foot strip of land along the line of the Illinois and Michigan Canal is necessary for the proper maintenance and use of the Illinois and Michigan Canal and constitutes a necessary integral part of said canal, and being so necessary for the use of the said Illinois and Michigan Canal and its maintenance, and being so an integral part of the said canal, the Trustees of the Illinois and Michigan Canal did not have, and the Canal Commissioners of the State of Illinois had not and does not now have, the right and authority under the law, to convey the same by deed, lease or otherwise. Wherefore, and by reason whereof your orators charge the fact to be that the Economy Light and Power Company, the defendant herein, has not acquired any right, title or interest in and to the bed of the stream of the Desplaines River, or that portion of said Section 25 last above described lying and being outside of the

meander line of the said Des Plaines River, or in and to the 90 foot strip of land lying between the waters of the Illinois and Michigan Canal and the said Desplaines River, and said deeds, leases, contracts and other agreements, in so far as they pertain to the bed of the stream of the Desplaines River, and to the lands lying outside of the meander line, and to 129 the 90 foot strip of land so reserved for the use of the Illinois and Michigan Canal, and so located in the south-east quarter of Section number 25 last above described, are void and of no effect.

And your orators charge the fact to be that by virtue of the several enactments of the Congress of the United States as hereinbefore set forth, and of the several acts of the Legislature of the State of Illinois as hereinbefore set forth, the bed of the Des Plaines River is owned by the State of Illinois, and that the same has not been conveyed by any deed to anybody whomsoever, and that the lands on said Section No. 25 last above described, and other sections of land along the line of the Des Plaines River, so granted to the State of Illinois by the act of Congress hereinbefore referred to, outside of the meandered line of said stream, to wit, the Des Plaines River, have not been conveyed by the State of Illinois nor by any other person or persons or corporation whomsoever having authority so to convey the same, and that the same remain and are owned by the State of Illinois.

IX. Your orators further state unto your Honors that notwithstanding the rights and interests of the people of the State of Illinois, as hereinbefore set forth, the Economy Light & Power Company, a corporation, claims or pretends to claim to be the owner of the bed of the stream of the Desplaines River and other lands in said southeast quarter of said Section number 25 above mentioned, and other lands for a 130 distance of several miles up the Desplaines River, which are outside of the meander line of the said Desplaines River, and so pretending and claiming to be the owner of said premises has threatened to erect, and has actually begun the erection of a dam across the Desplaines River, and across the 90-foot strip of land so reserved for the use of the Illinois & Michigan Canal, and across other lands outside of the meander line of the Desplaines River, and to connect said dam with the bank or tow path of the Illinois and Michigan Canal, and to so construct said dam as to cause the water to be backed up and to overflow the lands belonging to the State of Illinois, and other lands for a long distance above said pro-

posed dam, to wit, for the distance of ten miles, or thereabouts.

That your Attorney General heretofore, on the 12th day of December, A. D. 1907, caused to be served on said defendant, The Economy Light and Power Company, a certain notice and command in writing, notifying and commanding the said defendant, its officers, agents, servants and representatives, to cease and desist from in any manner infringing upon, trespassing upon or interfering with the said lands owned by the State of Illinois, or in which the State of Illinois or the People of the State of Illinois have an easement for the benefit of the public, located in said Section 25 in Grundy County, Illinois, by the erection of a dam thereon, or otherwise, and to cease and desist from in any way obstructing the Des-
131 plaines River or the Illinois River in said Section or elsewhere, and further notifying and commanding said defendant to remove any and all obstructions that it may have placed upon said premises, whether the same be in the bed of the Desplaines River or otherwise located; which notice and command in writing was served upon said defendant company by personal delivery of the same to John F. Gilchrist, Secretary of said defendant Company, who, on behalf of said defendant company then and there acknowledged service and receipt of the same; a copy of which notice and command, with said written receipt of service, as signed by said secretary, appended, is hereto attached and marked Exhibit M. But now so it is, may it please your Honors, that said defendant has ignored said notice and command and disregarded the same, and since the service and receipt thereof has continued and persisted in the work of constructing said dam at said place in the bed of said river, and has employed about one hundred men, with horses, wagons and machinery in so doing, and unless prevented by the injunction of this Honorable Court, will soon complete the same to the great impairment of said easement of navigation and to the great and irreparable injury of the people of the State of Illinois.

That if the said dam is permitted to be erected by the defendant, it will destroy and interfere with the Desplaines River as a navigable waterway for the use of the People of
the State of Illinois, and for all the People of the United
132 States; that it will overflow and destroy the value of the lands and the use of lands belonging to the State of Illinois adjacent to said Desplaines River, and outside of the meander line of said river; that it will destroy the use of the 90-foot strip of land so to be retained for the use and benefit

of the Illinois and Michigan Canal, and render the same inoperative and of purpresture impaired benefit to said canal; that it will destroy a feeder of the Illinois and Michigan Canal and will constitute a purpresture and that the same will produce and work irreparable loss and damage to the Illinois and Michigan Canal, and to the State of Illinois, and to the rights of the people of the State of Illinois.

133 X. Your orators further show that said agreement

Exhibit A, purports to give authority and consent by the Canal Commissioners unto the said Griswold and his assigns, to dam the Desplaines River, to back up water upon a ninety-foot strip and cause the same to be flooded, to excavate in and remove portions of said Kankakee feeder therein mentioned and of the structures therefor, to attach the said proposed dam to the tow path of the canal, to divert water from the Desplaines River, to attach and close up a levee to and along the tow path bank of the said canal, to use the gravel and material the property of the state, to enter upon the canal lands and the canal itself in and about said works, and to raise, change and alter buildings owned by the state and used in connection with said canal; as to each and every of which provisions the same were beyond the power of said Commissioners to grant.

That said consent and permission, purported to be conferred by said instrument, was without limit of time, and of right should be held, in law and in equity, to be without any authority, and to confer no authority, and be against the public policy of the state and in derogation of the rights and interests of the people, and to be revocable by the state.

The said lease, Exhibit B, purported to convey and demise interests in the said ninety-foot strip within the area described in said lease, to which reference is here made, in

134 that part of the canal called the Kankakee feeder, and purported to give a first right of renewal to the party of the second part therein named, and purported to be made subject to said contract Exhibit A. That each of said instruments purported to contract, on the part of said Canal Commissioners, with said Griswold, his successors and assigns, and by their terms might be assigned, one to one assignee and the other to another and different assignee.

That said contracts were entered into by the parties thereto with the mutual knowledge and understanding that the party of the second part and his assignee thereof intended to make use of the same in erecting said dam and developing water power thereon, and that the same amount to a lease of water

power rights and lands and lots connected therewith. That the said lease and contrast were not nor were either of them entered into upon notice by publication, nor limited to a period of ten years, contrary to the provision of a certain act entitled, "An Act to revise the law in relation to the Illinois and Michigan Canal, and for the improvement of the Illinois and Little Wabash Rivers," approved March 27th, 1874, and acts amendatory thereof, and, in particular, to the provisions of Clause 6 of Section 8 of said statute as amended by the certain act amendatory thereof, approved June 19th, 1891, in force July 1st, 1891; and your orators charge that the same are beyond the power of said Commissioners to enter into, and are null and void.

Your orators further show that treating said instruments as leases of water power they are subject to the power of the state, by its lawfully authorized agents, to resume, without compensation to the party of the second part therein named, his successors or assigns, the use of such water power, and are further subject to the power of the state to abandon or destroy the work by the construction of which the water privilege therein purported to be conferred shall have been created, whenever, in the opinion of the Legislature, such work shall cease to be advantageous to the state,—all in accordance with the provisions of said Clause 6 of said Section 8 of said Act approved March 27th, 1874, as amended by said Act approved June 19th, 1891.

Your orators further show that the opinion of the Legislature that such work has ceased to be advantageous to the state was duly expressed by the said statute heretofore cited, approved and in force December 6th, 1907, entitled "An Act recognizing the Desplaines and Illinois Rivers as navigable streams, and to prevent obstructions being placed therein, and remove obstructions therein now existing."

That said contract, Exhibit C, purports to leave to the said Griswold, and his successors and assigns, such right as is now, at the date thereof, under the control of the Canal Commissioners, to divert the waters of the Kankakee River into the Kankakee Feeder, and discharge the same into the Desplaines River, and to destroy and reconstruct the dam across the Kankakee River, and to construct at each end of said Kankakee feeder suitable gates for controlling the discharge of the Kankakee River through said feeder, and to enter upon the Kankakee feeder for the purposes therein named.

But your orators show that the said contract was a further

lease for the purpose of enabling the assignee therein to develop and create water power, and was not made in conformity to the provisions of the statute last cited in reference to the Illinois and Michigan Canal; and further show that said Kankakee feeder was an integral part of said canal, and that said agreement was beyond the power of said Commissioners to make.

But your orators further show that said lease, Exhibit C, contained the following provision, to wit:

"It is herein further stipulated and agreed, and the Canal Commissioners hereby expressly reserve the right to cancel this lease and recover possession of the land, property and rights above demised and referred to, whenever in the judgment of the Canal Commissioners, or other proper officers of the state, at such time having charge of Canal property, they shall deem the interests of the state require it to repossess and use said property for state purposes."

And your orators show that said power of revocation and cancellation may be exercised by the Legislature of the state and that the same was exercised by the Legislature of the state by the enactment of the statute hereinbefore mentioned, which was approved and in force December 6th, 1907, entitled "An

Act recognizing the Desplaines and Illinois rivers as navigable streams, and to prevent obstructions being placed therein, and remove obstructions therein now existing."

And your orators show that the exercise of the powers and privileges and rights purported to be conferred by said lease, Exhibit C, will constitute and create obstructions of the Desplaines River.

That said Deed Exhibit J purports to convey the lands therein described, and in terms to include lands lying and being situated outside of the meander line of the Desplaines River, and purports to be subject to the terms of said flowage contract Exhibit A, and said lease Exhibit B, and to renew the covenants thereof by the certain provision in said deed referring thereto, which recites that the said deed is "subject, however, to the terms, conditions and provisions of the flowage contract and lease made with said Harold F. Griswold, and bearing date September 2, A. D. 1904, which terms, conditions and provisions still remain in full force, and shall be fully kept and performed."

And your orators show that the said lands and lots described in said deed are lands and lots connected with the water power privileges sought and purported to be conferred and created by said contract Exhibit A, and said lease Ex-

hibit B, and that said advertisement thereof did not so designate and describe said properties, and did not limit the same to the term of ten years prescribed by law, and the same are beyond the power of the said Commissioners and are null and void, and are subject to the power in the state to resume the same and to abandon and destroy the work by the construction of which water privileges shall have been created, whenever in the opinion of the Legislature such work shall cease to be advantageous to the state;—and your orators show that the opinion of the Legislature that the same ceased to be advantageous to the state was duly expressed by the said statute approved and in force December 6th, 1907, entitled, "An Act recognizing the Desplaines and Illinois Rivers as navigable streams, and to prevent obstructions being placed therein, and remove obstructions therein now existing."

Your orators further show that said Pole lease, Exhibit K, purported to convey to said Griswold, his successors and assigns, the right to maintain a line of poles along said Canal from the west line of said Section 25, upon which said dam has been located, to Robey street in the city of Joliet, and from the same point in said Section 25 to the west limits of the City of Morris in Grundy County.

And your orators show that the said lease was made upon the same day as said contract and lease Exhibit A and Exhibit B, and was also for the purpose of developing the said water power and transferring and conveying the same as electrical energy by said proposed line of poles, and was subject to all the infirmities heretofore specifically alleged as to said contract and lease Exhibit A and Exhibit B.

And your orators further show that said contracts, deeds and leases were and each of them was entered into on inadequate consideration.

139 Forasmuch therefore, as your orators is without remedy in the premises, except in a court of equity, and to the end that the said Economy Light & Power Company, the defendant in this bill, may be required to make full and direct answer to the same, but not under oath, the answer under oath being hereby waived, and that the said deeds, leases and contracts hereinbefore mentioned and each of them may be set aside and be declared to be beyond the power of the said Canal Commissioners and null and void as to each and every part and in particular as to the bed of the Desplaines River, and as to the 90-foot strip of land hereinbefore described, and as to the lands lying and being situate outside of the

meander line of the Desplaines River, and as to the said part of the canal designated as the Kankakee feeder, and that the said Economy Light & Power Company, its officers, agents and servants, and each and all and every of them, shall be restrained by the order and injunction of this Honorable Court from erecting a dam across said Desplaines River and across the premises hereinbefore mentioned, and from causing the waters of the Desplaines River to back up and overflow the lands of the State of Illinois, and to refrain from permitting the obstruction already placed in said Desplaines River to be made and remade therein, and that your orator may have such other and further relief in the premises as equity may require and to your Honors shall seem meet.

May it please your Honor to grant unto your orator the people's writ of injunction to be directed to the Economy
140 Light & Power Company, restraining it and its officers, agents and servants, from erecting a dam across the Desplaines River and across the 90-foot strip of land adjoining the water course of the Illinois and Michigan Canal on the site thereof next to the Desplaines River, and across the lands outside of the meander line of the Desplaines River, and from causing the water of the Desplaines River to be backed up and to overflow the lands belonging to the State of Illinois, and from permitting the obstructions already placed in said Desplaines River and on said 90-foot strip of land and on said lands outside of the meander line of the Desplaines River by the Economy Light and Power Company, all located in and on the southeast quarter of Section No. 25 in Township No. 34 north, in Range No. 8 east of the Third Principal Meridian, in Grundy County, Illinois, to remain therein and thereon, until the further order of this court.

May it please your Honor to grant the writ of summons in chancery directed to the Sheriff of the County of Cook, commanding him that he summon the Economy Light & Power Company to appear before the said court on the first day of the next March Term thereof to be held at the court house in the City of Morris, in the County of Grundy aforesaid, and then and there to answer this bill.

W. H. STEAD,
Attorney General.

WALTER REEVES,
MERRITT STARR,
Special Counsel.

County of Cook. }
 141 State of Illinois, } ss.

Lyman E. Cooley, being first duly sworn on his oath deposes and says that he is duly authorized by the Attorney of the State of Illinois to make affidavit in this behalf; that he has heard read the foregoing bill and knows the contents thereof, and that the matters and things therein stated are true of his own knowledge except in so far as they are stated to be upon information and belief, and as to those matters he believes it to be true.

LYMAN E. COOLEY.

Subscribed and sworn to before me this 28th day of December, A. D. 1907.

(Signed) ARTHUR A. BLISS
Notary Public.

(Arthur A. Bliss
 Notarial Seal
 Cook County Ill)

Copy. Let an injunction issue according to the prayer of the bill with permission to the defendant to protect the works and machinery now on the grounds without however extending or increasing the work already done, without bond.

December 30, 1907.

S. C. STOUGH
Judge.

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EXHIBIT A.

This Agreement, made and entered into this 2nd day of September, A. D. 1904, by and between The Canal Commissioners of the State of Illinois, party of the first part, and Harold F. Griswold, of the City of Evanston, County of Cook and State of Illinois, his successors and assigns, party of the second part, Witnesseth:

Whereas, said party of the second part claims to be a riparian owner along certain streams of water called the Desplaines River and Illinois River, in the Counties of Grundy and Will, in the State of Illinois, and as such riparian owner is about to improve said Desplaines River by the construction of a dam and other works across the mouth of said river in the County of Grundy and State of Illinois, with a crest of such height that the pool formed thereby will be on a level with the waters of Lake Joliet (a portion of said Desplaines River

in Will County, Illinois) and is about to improve said Illinois River by deepening the channel of said river in Section Twenty-five (25), Township Thirty-four (34) North, Range VIII East of the Third P. M., and

Whereas, the State of Illinois is a riparian owner at different points on the Desplaines and Illinois Rivers within the territory covered by this contract, as well as the owner of the hereinafter described parcels of land, under the control of The Canal Commissioners, and which are not connected with water power upon the Illinois and Michigan Canal, 143 which said rapirian rights and said land have never produced a revenue, and said land is now unproductive of revenue, swamp, unfit for cultivation, and partially covered with water, and said lands are so situated that the riparian rights appurtenant thereto cannot be made available by the State to create water power, and

Whereas, said party of the second part is desirous of obtaining the right to use, overflow and damage (in such manner as will not interfere with navigation on the Illinois and Michigan Canal), so much of the said property as may be necessary in the construction of said dam and other works in the improvement of said Desplaines River and in the deepening of the channel of said Illinois River,

Therefore, in consideration of the premises and the sum of Two Thousand Two Hundred Dollars in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, it is agered as follows:

1st. That said party of the first part consents that said party of the second part shall have the right and authority in so improving the Desplaines River, to construct a dam and other works across the Desplaines or Illinois River at a point near the confluence of the Desplaines and Kankakee Rivers, in the County of Grundy and State of Illinois, with a crest at an elevation of not to exceed minus seventy-three and two-tenths (73.2) Chicago city datum, but in no event 144 shall the back water caused by said dam extend beyond the northerly limits of "Lake Joliet" (said "Lake Joliet" being a wide portion of the Desplaines River about six miles in length and lying south of the City of Joliet in the County of Will and State of Illinois) and further consents that said party of the second part may excavate in and deepen the channel of the Illinois River in Section 25, Township 34 North, Range VIII East of the 3rd P. M.

2nd. That said party of the second part shall have the right and authority to flow the ninety-foot reserve strip of

the Illinois and Michigan Canal in Sections 25 and 26, Township 34, North, Range VIII, Grundy County, Illinois, and in Sections 31, 30, 29 and 20, Township 34 North, Range IX, Will County, Illinois, up to the canal bank; also so much of the north fraction of Section 31, Township 34 North, Range IX East of the 3rd P. M. as lies south of the ninety-foot reserve strip along the towpath side of the Illinois and Michigan Canal, where the same may be overflowed by reason of the construction of said dam and other works with the crest hereinbefore specified, together with the right to flow the water up against the towpath bank of the Illinois and Michigan Canal in said sections Provided the towpath shall be protected and preserved as hereinafter provided.

3rd. That said party of the second part shall have the right to excavate in, and remove so much of the Kankakee Feeder (an abandoned feed of the Illinois and Michigan Canal) lying north of the Desplaines River, and south of the ninety-foot strip in Section 21, Township 34 North, Range IX, Will County, Illinois, as may be necessary to discharge the waters of the Desplaines River through said Section 31 in a proper manner, and shall also have the privilege of removing the old aqueduct piers in said section.

4th. That said party of the second part shall have the right to erect, attach, repair and maintain, said dam and other works or structure upon against the towpath bank of the Illinois and Michigan Canal in Section 25, Township 34 North, Range VIII East of the 3rd P. M., Grundy County, Illinois, but not so as to interfere in any manner with the use of said towpath in connection with said canal.

5th. That said party of the second part shall have the right to turn and divert from the Desplaines River into the Kankakee River a certain stream of water called the "Kankakee Cutoff", through, over and across said Kankakee Feeder and the ninety-foot strip on each side of said feeder in Section 5, Township 33, North, Range IX East of the 3rd P. M., and said party of the second part is granted the right to construct on the banks of said feeder controlling gates for flood protection from said Kankakee River.

6th. It shall be the duty of said party of the second part, subject to the direction of The Canal Commissioners, or other officers or agent as hereinafter indicated, to raise the towpath or bank of the Illinois and Michigan Canal from its present height not less than two feet and to any additional height that may be necessary to prevent overflow and to perpetually thereafter maintain the same in good condi-

tion. The raising of said towpath shall extend from the point in said Grundy County where the dam or other structure of said party of the second part intercept said towpath bank to lock Number Seven in Section 17, Township 34 North, Range IX East of the 3rd P. M., and when raised the width of the top of the towpath bank shall, conform to the width of the towpath as it exists at the present time.

7th. Permission and authority is hereby given said party of the second part to attach and close a levee to the towpath bank of the Illinois and Michigan Canal at the point in said towpath bank where the east and west half section line of Section 20, Township 34 North, Range IX East of the 3rd P. M., intercepts said towpath bank; and further permission is also given to construct levees on the east and west banks of the DuPage River from the dam across said river to the north line of Section 20, Township 34 North, Range IX East of the 3rd P. M., and attach and close said levees to the west and east sides respectively of said dam across the DuPage River in Section 17, Township 34 North, Range IX East of the 3rd P. M., as indicated more clearly by the blue print 147 hereto attached and made a part of this contract as "Exhibit A."

8th. Permission is hereby given said party of the second part to use so much of the gravel or other material lying along said Illinois and Michigan Canal, the property of the State of Illinois, as may be necessary to raise said towpath bank of said Illinois and Michigan Canal. Such material, however, to be taken out from places indicated or approved by the General Superintendent of the Canal, or other officer or agent designated by the Canal Commissioners or other officers in charge.

9th. That the said party of the second part is hereby authorized to enter upon the lands or premises of the State of Illinois, part and parcel of the Illinois and Michigan Canal and to enter upon said canal itself in a manner and to the extent that shall be necessary to raise and maintain the towpath as above provided, and to attach and build said dam or other works onto said towpath bank as herein provided, and to repair, maintain or renew the same as shall become necessary to the preservation thereof.

10th. It is herein further stipulated and agreed by and between the said parties hereto that said party of the second part shall raise the building owned by the State of Illinois in Section 31, Township 34 North, Range IX East of the 3rd P. M., and used in connection with the Illinois and Michigan

Exhibit A
Defendant
Exhibit

As to
that's
12.

Canal, to a level with the towpath of said canal when the
148 same is raised, as provided in Paragraph 6 hereof. Said
party of the second part will also provide two acres of
land to be used by said party of the first part in connection
with said buildings as a garden. The raising of said build-
ings and the providing of said land shall be to the satisfac-
tion of the General Superintendent or other officer or agent
in charge of said canal.

11th. It is herein further stipulated and agreed by and
between the parties hereto that all work hereinbefore pro-
vided for, or which shall affect the canal property or inter-
ests, shall be done under the supervision of, and to the satis-
faction of The Canal Commissioners or their duly authorized
agent or agents, and not otherwise; and such work when so
completed shall at all times be kept and maintained by said
party of the second part under the like supervision and to
the approval of said The Canal Commissioners, or their of-
ficers or agent duly authorized to represent them.

12th. It is herein further stipulated and agreed by and be-
tween the parties hereto that the cost of inspecting the work
herein provided for to be inspected by said party of the first
part shall be paid by said party of the second part.

13th. It is herein further stipulated and agreed by and
between the parties hereto that said party of the second part
shall be responsible for and pay any and all damages that
may be sustained by the State of Illinois, or The Canal
149 Commissioners, or the Canal property, or the persons or
property using said Illinois and Michigan Canal, or that
shall be occasioned by the construction of the works herein-
before contemplated to be done or made by said party of the
second part, or in the subsequent repair or maintenance there-
of, or which shall be occasioned by the use of the dam, levees,
or other works above provided for.

This Agreement shall be binding upon and inure to the
benefit of the respective successors and assigns of the parties
hereto.

In Witness Whereof, the said party of the first part has
caused these presents to be signed by its president, and its
corporate seal to be hereto affixed and duly attested, and said
party of the second part has hereunto set his hand and seal
the day and year first above written.

Attest:

W. R. NEWTON,
Secretary.

THE CANAL COMMISSIONERS,
C. E. SNIVELY,
President.

HAROLD F. GRISWOLD. (Seal)

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EXHIBIT B.

Exhibit B
Defendant
Exhibit 2

This Indenture, made this 2nd day of September, A. D. 1904, between The Canal Commissioners of the State of Illinois, party of the first part, and Harold F. Griswold, of the City of Evanston, County of Cook and State of Illinois, his successors and assigns, party of the second part, Witnesseth:

That the said party of the first part, in consideration of the covenants of the said party of the second part, hereinafter set forth, doth by these presents lease to the said party of the second part the following described property, to wit:

The ninety foot strip along the towpath side and outside of the towpath of the Illinois and Michigan Canal in Sections 25 and 36, Township 34 North, Range VIII East of the 3rd P. M., Grundy County, Illinois, and said ninety foot strip in Sections 31, 30, 29 and 20, Township 34 North, Range IX East of the 3rd P. M., Will County, Illinois. Also that part of the North half of Section 31, lying south of the ninety-foot reserve strip along the towpath side of said canal. Also that part of the Kankakee Feeder and the 90-foot strip on each side of said Feeder in Section 31, Township 34 North North, Range IX East of the 3rd P. M. and in Section V, Township 33 North, Range IX East of the 3rd P. M., Will County, Illinois.

To Have and to Hold the same to the said party of the second part from the 2nd day of September A. D., 1904, to the second day of September, A. D. 1924, subject to a 151 tract dated the 2nd day of September A. D., 1904, to said Harold F. Griswold, affecting said premises.

And the said party of the second part, in consideration of the leasing the premises as above set forth, covenants and agrees with the party of the first part to pay the said party of the first part as rent for the same the sum of \$500.00 in full for the term of this lease, the receipt of which \$500.00 is hereby acknowledged.

And it is further covenanted and agreed between the parties aforesaid that said party of the second part is hereby charged with knowledge of all of the provisions contained in said contract with Harold F. Griswold, in so far as they affect the premises hereby leased.

It is further understood and agreed by and between the parties hereto that in case said party of the first part shall determine to re-lease the land hereby demised at the expiration of this lease that then and in such event the said party of the

second part shall have the first right to re-lease the same by paying therefor as much as shall be offered by any other person or party therefor, provided, however, that such rental may at the option of said party of the first part be ascertained, determined and fixed by three appraisers, one to be chosen by each of the parties hereto and the third by the two thus chosen, but in no event shall the rent be less than the amount fixed in this lease; and said party of the second
152 part hereby covenants and agrees that he will, and he hereby offers to pay the same rental as herein agreed to be paid for another term of twenty years, to begin at the expiration of the term hereby granted.

It is further understood and agreed that in case said party of the second part shall desire to re-rent said property for a further term of twenty years at a rental to be agreed upon by the parties hereto or fixed by appraisers as aforesaid, he shall notify said party of the first part in writing of such desire at least one year before the expiration of the term hereby demised.

The covenants herein shall extend to and be binding upon the heirs, executors, administrators, successors and assigns of the parties to this lease.

In Witness Whereof, the party of the first part has caused this instrument to be signed by its President and attested by its Secretary, and duly authorized its corporate seal to be hereunto attached, and said party of the second part has hereunto set his hand and seal the day and year first above written.

THE CANAL COMMISSIONERS
By C. E. SNIVELY,
President.

Attest:

W. R. NEWTON,
Secretary.

HAROLD F. GRISWOLD, (Seal)

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EXHIBIT C.

This Indenture, made this 8th day of August, A. D., 1905, between The Canal Commissioners of the State of Illinois, party of the First part, and Harold F. Griswold, of the City of Evanston, County of Cook and State of Illinois, his successors and assigns, party of the second part, Witnesseth:

Whereas, said party of the second part, has made applica-

tion to The Canal Commissioners of the State of Illinois to lease the right of the State to divert the waters of the Kankakee River into the Kankakee Feeder and discharge the same into the Desplaines River, in Section 31, Township 34, North, Range 9, East of the Third Principal Meridian; and also the right of the State to reconstruct the dam, the property of the State of Illinois, across the Kankakee River, in Section 9, Township 33, North Range 9, east of the Third Principal Meridian, and the right of the State to repair the bank of the said Kankakee Feeder and to construct at each end of said Feeder suitable gates for controlling the discharge of said waters through said Feeder; and

Whereas, The Atchison, Topeka & Santa Fe Railway Co., and the Chicago & Alton Railway Co., have made separate fills or embankments across said Feeder in Section 9, Township 33 North, Range 9 East of the Third Principal Meridian, with permission of The Canal Commissioners, and are now using the same as a part of their respective road-beds across said feeder;

Therefore, in consideration of the premises and the 154 covenants and agreements of said party of the second part, hereinafter following, the application of said party of the second part is hereby granted, and the said party of the first part, by these presents, doth lease to said party of the second part the rights of the State now within the control of The Canal Commissioners, to-wit: such right as is now under the control of The Canal Commissioners to divert the waters of the Kankakee River into the Kankakee Feeder and discharge the same into the Desplaines River, in Section 31, Township 34 North Range 9 East of the Third Principal Meridian, together with such right of the State as is now under the control of The Canal Commissioners to restore and reconstruct the dam across the Kankakee River, in Section 9, Township 33 North Range 9 East of the 3rd Principal Meridian, but in such restoration the crest of such dam shall not be higher than it has heretofore been; also such right of the State as is within the control of The Canal Commissioners to construct at each end of said Kankakee Feeder suitable gates for controlling the discharge of the waters of said Kankakee River through said Feeder; and such right as The Canal Commissioners now have to enter upon the Kankakee Feeder and the dam in connection therewith, for the purpose of repairing the banks of said Feeder or repairing the dam across said Kankakee River or the gates at each end of said Feeder; to have and to hold the same for the full period

C to
defendant's
Exhibit 2.

155 of twenty (20) years from the date hereof, subject however to whatever legal rights said railway companies respectively have to cross said Feeder upon such embankments and otherwise, also subject to the provisions of certain leases heretofore made to Harold F. Griswold of the City of Evanston, and Charles A. Munroe, of the City of Chicago, both of the County of Cook and State of Illinois.

And the said party of the second part further agrees to pay to the said party of the first part, as the consideration for the rights hereinabove described, the sum of one hundred and fifty dollars (\$150.00) per year for each and every year of the term hereby demised, payable on the 10th day of August A. D., 1905, and on the 10th day of August in each and every year of said term hereby demised.

And it is further provided that said party of the second part shall have the right to cancel this lease at any time at his option after five (5) years from the date hereof.

It is herein further stipulated and agreed by and between the said lessor and lessee as a part of the consideration of this lease, that at the expiration of this lease, or in case of the earlier termination thereof under its provisions, or in accordance with the law, that said lessee, the party of the second part, shall restore the said dam, and feeder, to its present condition, and restore the flowage of all water to its present channel at his own and sole expense, unless he shall be

156 directed not to do so by written notice from said party of the first part or other officers or officer at such time having charge of said Illinois and Michigan Canal; and in case of failure on the part of said lessee so to do, the said party of the first part, or other officers or officer, in charge of said canal, shall have the right to so restore said dam, feeder and water to its present condition at the expense of said party of the second part; and said party of the second part, for himself, his heirs, executors, administrators and assigns, hereby covenants and agrees to and with said party of the first part and the officer or officers at such time in charge of said canal, and the State of Illinois, that he will refund and pay to them or it the full cost of the restoration of such dam, feeder and water to its present condition and place, within thirty (30) days after he or they shall be presented with a statement of such cost and expense.

It is herein further expressly stipulated and agreed by and between the parties hereto, and said party of the second part hereby, for himself, his heirs, executors, administrators and assigns, covenants and agrees to and with said party of the

first part, the officer or officers in charge of the Illinois and Michigan Canal, and the State of Illinois, that he, and they, will fully and completely protect, save and keep harmless, the said party of the first part, such officer or officers, and said State of Illinois, from any and all damages and 157 claim for damages which may be made against such officers or said State by reason of, or growing out of any work which said party of the second part, his heirs, executors, administrators or assigns shall or may do, or shall attempt to do under and by virtue of this instrument or any of the rights granted or attempted to be granted hereby, whether by the flowage of land, back water, change of present channel or flowage of water or otherwise, whether of the kind or character herein enumerated or different or otherwise, including any and all costs, expenses and attorneys fees which shall or may grow out of, or be incurred in connection with any and all such claims made or asserted, or suits brought in reference thereto; and said party of the second part, his heirs, executors, administrators and assigns, likewise, as further and additional security and protection against loss or claims, further covenants and agrees that, he and they, will, before any work shall be commenced under this contract, duly execute, acknowledge and deliver to said party of the first part a bond of indemnity in such form and for such an amount as they, the said party of the first part, shall determine and specify and shall be adequate to fully and completely protect said party of the first part, said officer or officers and said State of Illinois against any and all damages, loss, cost, expense and attorney's fees which shall be made, claimed, or 158 be incurred or grow out of any and all things done or attempted to be done by said party of the second part, his heirs, executors, administrators or assigns, under or by virtue of this instrument; and in case said party of the second part, his heirs, executors, administrators or assigns, or any of them, shall fail or refuse to duly execute and deliver such bond, within thirty (30) days after written request therefor shall be served upon him or any of them, then, and in such event, all rights granted under this instrument shall at once cease and determine and shall at once revert to and revert in said party of the first part and the State of Illinois.

It is herein further provided that this lease may be extended for a further period of twenty years at a rent to be fixed by an appraisal, to be made by three disinterested appraisers, to be appointed by the Governor and the rent fixed by such appraisal shall be subject to the approval of The

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Canal Commissioners or other proper officers of the State at such time having charge of the Canal property.

It is herein further stipulated and agreed, and the Canal Commissioners hereby expressly reserve the right to cancel this lease and recover possession of the land, property and rights above demised and referred to whenever in the judgment of The Canal Commissioners, or other proper officers of the State at such time having charge of Canal property, they shall deem the interests of the State require it to repossess and use said property for State purposes.

159 In Witness Whereof, the party of the first part has caused this instrument to be signed by its President, and attested by its Secretary and duly authorized its corporate seal to be attached, and said party of the second part has hereunto set his hand and seal the day and year first above written.

THE CANAL COMMISSIONERS,
By C. E. SNIVELY,
President.

Attest:
W. R. NEWTON,
Secretary.

HAROLD F. GRISWOLD, (Seal)

Attest:
LAURA SCHUMACHER.

State of Illinois, }
County of Cook. } ss.

I, Carl A. Ross, a Notary Public, in and for said County in the State aforesaid, do hereby certify that Harold F. Griswold, personally known to me to be the same person whose name is subscribed to the foregoing instrument, appeared before me this day in person and acknowledged that he signed, sealed and delivered the said instrument as his free and voluntary act for the uses and purposes therein set forth.

Given under my hand and notarial seal, this 10th day of August A. D., 1905.

CARL A. ROSS,
Notary Public.

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EXHIBIT D.

Exhibit D
Defendant's
Exhibit

Office of The Canal Commissioners,
Lockport Ill., June 11, 1904.

To the Honorable Richard Yates,
Governor of the State of Illinois,
Springfield, Illinois.

Dear sir:

The undersigned Canal Commissioners recommend that the interest of the State of Illinois in and to the parcel or tract of land hereinafter specifically described, being part of the canal lands or lots of the State of Illinois other than those connected with water power upon the said canal and the ninety foot strip along the canal:

A tract or parcel of land in Section Thirty-one (31), Township Thirty-four (34) North of Range Nine (9) East of the Third (3rd) Principal Meridian, which lies north of the center of the Desplaines River and south of the Ninety Foot reserve line of the Illinois and Michigan Canal, in the County of Will and State of Illinois,

Should be sold, as in our judgment the interest of the State will be promoted thereby: and

The Canal Commissioners request the approval of your Excellency to the sale thereof at public auction to the highest and best bidder for cash at the Canal Office in Lockport, Illinois, on the Second (2nd) day of August, 1904, at Ten o'clock in the morning, thirty (30) days previous notice 162 of said sale being first given in some newspaper published in the County of Will where such tract or parcel of land is situated.

Signed C. E. SNIVELY
President.

Signed W. R. NEWTON
Secretary.

Signed W. L. SACKETT
Treasurer.

*The Canal Commissioners of
the State of Illinois.*

Ex E to
Defendant's
Exhibit 2.

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EXHIBIT E.

I hereby approve of the sale of the tract or parcel of land described in the foregoing report of The Canal Commissioners at public auction to the highest and best bidder for cash at the Canal Office at Lockport, County of Will and State of Illinois, on the Second (2nd) day of August, 1904, at Ten O'Clock in the morning, thirty (30) days previous notice of said sale being first given by The Canal Commissioners in some newspaper published in the County of Will where such tract or parcel of land is situated.

Done at Springfield this 14th day of June, 1904.

RICH. YATES

Governor of the State of Illinois.

Ex F to
Defendant's
Exhibit 2.

164

EXHIBIT F.

State of Illinois, } ss.
Will County.

The Will County Printing Company (incorporated), does hereby certify that it is the publisher of the Lockport Phoenix-Advertiser, a weekly newspaper of general circulation, printed and published in the village of Lockport, in said County, and that the advertisement or notice hereto annexed relating to the matter of sale of canal lands has been published in said paper, in every copy and impression thereof, once each week, for three weeks consecutively of the issues commencing June 16th, A. D., 1904, and ending June 30th, A. D., 1904, which are the dates of the first and last papers containing the same.

Given under the corporate seal of the Will County Printing Company, this 17th day of December, A. D., 1907.

THE WILL COUNTY PRINTING CO., INC.,

Per T. A. CHEADLE,

(Seal)

Secy. & Treas.

Subscribed and sworn to before me by T. A. Cheadle, this 17th day of December, 1907.

(Seal)

WILLIAM W. NORTH,

Notary Public.

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Copy of Notice Herein Referred to:

Exhibit
Defendant
Exhibit

Sale of Canal Lands.

Office of the Illinois and Michigan Canal,
Lockport, Illinois, June 15, 1904.

Pursuant to the statute of the State of Illinois, the interest of the State of Illinois in the following described parcels or tracts of land, will be sold at public auction to the highest and best bidder for cash at the Canal Office in Lockport, County of Will and State of Illinois, on the second (2nd) day of August, 1904, at ten o'clock in the morning, in full conformity with "An Act to amend section eight (8) of 'an act to revise the law in relation to the Illinois and Little Wabash Rivers,' approved March 27, 1874, in force July 1st, 1874, as amended by an act of June 19, 1891, in force July 1, 1891," approved April 21, 1899, in force July 1, 1899; situated in the County of Will and State of Illinois, to wit:

A tract or parcel of land in section thirty-one (31), township thirty-four (34) north, of range nine (9) east of the third (3rd) principal meridian, which lies north of the center of the Desplaines River and south of the ninety-foot reserve line of the Illinois and Michigan Canal, in the 166 County of Will and State of Illinois.

The Canal Commissioners reserve the right to reject any and all bids.

C. E. SNIVELY,
President.

W. R. NEWTON,
Secretary.

W. L. SACKETT,
Treasurer.

*The Canal Commissioners of the
State of Illinois.*

June 16-23 and 30, '04.

Exhibit G to
Defendant's
Exhibit 2.

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EXHIBIT G.

Lockport, Illinois, November 1, 1904.

To the Honorable Richard Yates,
Governor of the State of Illinois,
Springfield, Illinois.

Dear sir:—

The undersigned Canal Commissioners recommend that the interest of the State of Illinois in and to the parcel or tract of land hereinafter specifically described, being part of the canal lands or lots of the State of Illinois other than those connected with water power upon the said canal and the ninety-foot strip along the canal:

That part of Section Thirty-one (31), Township Thirty-four (34) North, Range Nine (9) East of the Third (3rd) P. M., Will County, Illinois, lying southwest and southeast of the Illinois and Michigan Canal and Northeast and Northwest of the Desplaines River (excepting and reserving the ninety-foot strip of the Illinois and Michigan Canal) subject to the right of flowage and lease of Harold F. Griswold, should be sold, as in our judgment the interests of the State will be promoted thereby; and

The Canal Commissioners request the approval of your Excellency to the sale thereof at public auction to the highest and best bidder for cash at the canal office in Lockport,

Illinois, on the 6th day of December, 1904, at ten o'clock 168 in the morning, thirty (30) days previous notice of said sale being first given in some newspaper published in the County of Will where such parcel or tract of land is situated.

C. E. SNIVELY,
President.

W. R. NEWTON,
Secretary.

W. L. SACKETT,
Treasurer.

*The Canal Commissioners of the
State of Illinois.*

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EXHIBIT H.

Exhibit
Defendant
Exhibit

I hereby approve of the sale of the parcel or tract of land described in the foregoing report of the Canal Commissioners at public auction to the highest and best bidder for cash at the Canal Office at Lockport, County of Will and State of Illinois, on the 6th day of December, 1904, at ten o'clock in the morning, thirty (30) days previous notice of said sale being first given by The Canal Commissioners in some newspaper published in the County of Will where such parcel or tract of land is situated.

Done at Springfield this 2nd day of November, 1904.

RICH. YATES,

Governor of the State of Illinois.

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EXHIBIT I.

Exhibit
Defendant
Exhibit

State of Illinois, }
Will County. } ss.

The Will County Printing Company (incorporated) does hereby certify that it is the publisher of the Lockport Phoenix-Advertiser, a weekly newspaper of general circulation, printed and published in the village of Lockport in said County, and that the advertisement or notice hereto annexed relating to the matter of sale of Canal Lands has been published in said paper, in every copy and impression thereof, once each week, for three weeks consecutively of the issues commencing November 3rd, A. D., 1904, and ending November 17th, A. D., 1904, which are the dates of the first and last papers containing the same.

Given under the corporate seal of the Will County Printing Company this 17th day of December, A. D. 1907.

THE WILL COUNTY PRINTING Co., INC.

Per T. A. CHEADLE,

Secy. & Treas.

(Seal.)

Subscribed and sworn to before me by T. A. Cheadle, this 17th day of December, 1907.

WILLIAM W. NORTH,
Notary Public

(Seal.)

Copy of Notice Herein Referred To.

Office of the Illinois and Michigan Canal.

Lockport, Illinois, November 3rd, 1904.

Pursuant to the statute of the State of Illinois, the interest of the State of Illinois in the following described parcel or tract of land will be sold at public auction to the highest and best bidder for cash at the Canal Office in Lockport, County of Will and State of Illinois, on the 6th day of December, 1904, at ten o'clock in the morning, in full conformity with "an act to amend section eight (8) of 'an act to revise the law in relation to the Illinois & Michigan Canal and for the improvement of the Illinois and Little Wabash Rivers', approved March 27, 1874, in force July 1, 1874," approved April 21, 1899, in force July 1, 1899; situated in the County of Will and State of Illinois, to wit:

That part of section thirty-one, Township thirty-four (34) North, Range nine (9) East of the Third (3rd) P. M., Will County, Illinois, lying southwest and southeast of the Illinois and Michigan Canal and northeast and northwest of the Desplaines River (excepting and reserving the ninety-foot strip of the Illinois and Michigan Canal) subject to the 172 right of flowage and lease of Harold F. Griswold.

The Canal Commissioners reserve the right to reject any and all bids.

C. E. SNIVELY,
President.
W. R. NEWTON,
Secretary.
W. L. SACKETT,
Treasurer.

Nov. 3, 3-10-17-'04.

EXHIBIT J.

Illinois and Michigan Canal.

Know All Men By These Presents, that the Canal Commissioners of the State of Illinois, under the authority vested in them, by the act of the Legislature of the State of Illinois, entitled "An act to revise the law in relation to the Illinois

and Michigan Canal, and for the improvement of the Illinois and Little Wabash Rivers." Approved March 27th, 1874, in force July 1st, 1874; as amended June 19th, 1891, in force July 1st, 1891; amended April 21st, 1899, in force July 1st, 1899, in consideration of five hundred dollars (\$500.), the receipt whereof is hereby acknowledged, do hereby convey and quit-claim unto Harold F. Griswold, the following described parcel or tract of land, to wit:

That part of section thirty-one (31), Township thirty-four (34) North, Range nine (9) East of the Third Principal Meridian, Will County, Illinois, lying southwest and southeast of the Illinois and Michigan Canal and northeast and northwest of the Desplaines River (excepting and reserving a strip of land ninety (90) feet in width on the southerly side of the Illinois and Michigan Canal and bordering thereupon, and continuous throughout the said section thirty-one (31), Township thirty-four (34) North, Range nine (9) East of the Third Principal Meridian), Subject However, to the terms, conditions and provisions of the flowage contract and 174 lease made with said Harold F. Griswold and bearing date September second (2nd) A. D. 1904, which terms, conditions and provisions still remain in full force and shall be fully kept and performed.

Duplicate

To Have And To Hold the same, together with all the rights, privileges, immunities and appurtenances thereunto belonging unto said Harold F. Griswold, his heirs and assigns forever.

In Witness Whereof, the said Canal Commissioners of the State of Illinois, have caused their official seal to be affixed hereunto by their secretary and their official names subscribed hereto by their president, this sixth day of January A. D., 1905.

THE CANAL COMMISSIONERS OF THE STATE OF
ILLINOIS, by

G. E. SNIVELY,
President.

Attest.

W. R. NEWTON,
Secretary.

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EXHIBIT K.

"Memorandum of agreement made and entered into between the Canal Commissioners of the State of Illinois, party of the first part, and Harold F. Griswold, of the City of Evanston, County of Cook and State of Illinois, his successors and assigns, party of the second part, witnesseth:

"That the Canal Commissioners, in consideration of the covenants and agreements hereinafter set forth, to be kept and performed by the said party of the second part, hereby grants to said party of the second part, the right to place and thereafter maintain a line of poles along and upon the land belonging to the State of Illinois, part and parcel of the Illinois and Michigan Canal lands, to be located as hereinafter designated, between the west line of Section 25, Township 34, North, Range 8, Grundy County, Illinois, and Roby street in the City of Joliet, Will County, Illinois; and between the west line of Section 25, Township 34, North, Range 8, Grundy County, Illinois, and the west limits of the City of Morris, in the County of Grundy and State of Illinois. Said line of poles and wires are to be located and built

side of the said Canal, and under the direction and supervision of said Canal, or the officer having charge and supervision of the said Canal; provided that where, in the judgment of said superintendent, or officers, the topography

176 of the ground makes it necessary or expedient to have said poles upon the towpath bank of said canal, authority is hereby given to said party of the second part to cross said canal and place poles along the said towpath bank. The necessity or expediency thereof, the place and manner of crossing and placing said poles along said towpath bank to be subject to the approval, and under the direction and supervision of said superintendent, or officer. It is distinctly understood, however, that the aforesaid line of poles shall not, in any event, be located, or maintained in said place, or manner as to interfere with the use or operation of the said canal.

"To have and to hold said privilege to the party of the second part, his successors and assigns, until the 2nd day of September, A. D., 1924; provided that the Canal Commissioners reserve the right to at any time require any change to be made in the location of said line of poles, subject, how-

ever, to any pole line rights now existing, and the right to grant other pole line rights is hereby expressly reserved by the said party of the first part.

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"In consideration of the above, the said party of the second part, for himself, his successors and assigns, covenants and agrees to pay to the Canal Commissioners the sum of \$750. for said right between the said west line of section 25,

Township 34, North, Range 8, Grundy County, Illinois, 177 and Roby street, in the city of Joliet, Will County, Illinois, and the sum of \$250. for said right between the west line of said Section 25 and the west line of the City of Morris, in said Grundy County, Illinois, the receipt of which \$750. and said \$250. is hereby acknowledged.

"It is hereby further stipulated and agreed that said poles shall be used for the sole and only purpose of stringing thereon the wires of the said party of the second part to carry electricity from and generated at the proposed plant of the said party of the second part, in Section 25, Township 34, North, Range 8, Grundy County, Illinois.

"The said party of the second part further covenants and agrees that it will construct and maintain said pole line and wires in good and workmanlike manner, and will so maintain and operate the same as not to interfere with business along said canal, or the business or property of other persons, or corporations, and also assume all liability for all deaths or personal injuries, or injury to property, or others, which may occur by reason of the construction, or operation of said pole lines, and that it will forever indemnify and save harmless the Canal Commissioners of the State of Illinois from and against all claims or liabilities for or by reason of any damage, the risk of which is hereby assumed by the party of the second part; and also from and against all claims, 178 liabilities or judgments on account of any death or injury, or damage to personal property, all liability for which is assumed by the party of the second part, and the party of the second part agrees to pay all charges and expenses that may be incurred, or any judgments that may be rendered by reason thereof.

"In witness whereof, the said party of the first part have caused this instrument to be signed by the president and attested by its secretary and has duly authorized its corporate seal to be hereunto attached; and said party of the second

Exhibit K to
Defendant's
Exhibit 2.

part has hereunto set his hand and seal this 2nd day of September, A. D., 1904.

"THE CANAL COMMISSIONERS,

"By C. E. SNIVELY,

President,

"HAROLD F. GRISWOLD. (Seal)

"Attest:

"W. R. NEWTON,

Secretary."

Exhibit L to
Defendant's
Exhibit 2.

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EXHIBIT L.

Resolved, by the Senate, the House of Representatives concurring herein, That there shall be submitted to the electors of this State at the next election of members of the General Assembly, a proposition to amend the constitution of this State, to-wit:

Resolved, That the separate action of the constitution of this State relating to the canal be amended to read as follows:

The Illinois and Michigan canal, or other canal or waterway, owned by the State shall never be sold or leased until the specific proposition for the sale or lease thereof shall first have been submitted to a vote of the people of the State at a general election, and have been approved by a majority of all the votes cast at such election. The General Assembly shall never loan the credit of the State or make appropriations from the treasury thereof, in aid of railroads or canals;

Provided, That any surplus earnings of any canal, waterway or water power may be appropriated or pledged for its enlargement, maintenance or extension; and,

Provided, further, That the General Assembly may, by suitable legislation, provide for the construction of a deep waterway or canal from the present water power plant of the Sanitary Drainage District of Chicago, at or near Lockport, in the township of Lockport, in the County of Will, to a point in

the Illinois river at or near Utica, which may be practical

180 for a general plan and scheme of deep waterway along a route, which may be deemed most advantageous for such plan of deep waterway; and for the erection, equipment and maintenance of power plants, locks, bridges, dams and appliances sufficient and suitable for the development and utilization of the water power thereof; and authorize the issue, from time to time, of bonds of this state in a total amount not to exceed twenty million dollars, which shall draw interest, payable semi-annually, at a rate not to exceed four per cent per

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annum, the proceeds whereof may be applied as the General Assembly may provide, in the construction of said waterway and in the erection, equipment and maintenance of said power plants, locks, bridges, dams and appliances.

All power developed from said waterway may be leased in part or in whole, as the General Assembly may by law provide; but in the event of any lease being so executed, the rental specified therein for water power shall be subject to a revaluation each ten years of the term created, and the income therefrom shall be paid into the treasury of the State.

Concurred in by the House October 16, 1907, by a two-thirds vote.

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EXHIBIT M.

Exh
Def
Exh

To The Economy Light and Power Company:

I, W. H. Stead, as Attorney-General of the State of Illinois, by virtue of the authority vested in me by law do hereby notify and command you, and your officers, agents, servants and representatives, to cease and desist from in any manner infringing upon, trespassing upon or interfering with the lands owned by the State of Illinois or in which the State of Illinois or the people of the State of Illinois have an easement for the benefit of the public, and located in Section Number Twenty-five (25), in Township Number Thirty-four (34) North, in Range Number eight (8) East of the Third Principal Meridian, in Grundy County, Illinois, by the erection of a dam thereon or otherwise, and to cease and desist from in any way obstructing the Des Plaines River or Illinois River in said Section or elsewhere.

And you are further notified and commanded to remove any and all obstructions that you may have placed upon said premises, whether the same be in the bed of the Des Plaines River or otherwise located.

Dated this 12th day of December, A. D. 1907.

W. H. STEAD,
*Attorney-General of the State
of Illinois.*

Received a copy of the foregoing notice this 12th day of December, A. D. 1907.

THE ECONOMY LIGHT AND POWER COMPANY,
By JOHN F. GILCHRIST,

Secy.

182 Endorsed: Filed this 30th day of December, A. D. 1907, Fred S. Johnson, Clerk.

Exhibit M to
Defendant's
Exhibit 2.

State of Illinois, { ss.
Grundy County. }

I Fred S. Johnson, Clerk of the Circuit Court of Grundy County, in the State aforesaid, and keeper of the records and files of said Court, do hereby certify the above and foregoing to be a true, perfect and complete copy of Bill of Complaint, Filed December 30th 1907 in a certain cause lately pending in said Court on the Chancery side thereof, wherein The People ex rel. Charles S. Deneen & William H. Stead, Atty. Gen. were complainants & The Economy Light & Power Co., was defendant, as the same appears from the records and files of said Court now in my office remaining.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Morris, this 10th day of December, A. D. 1913.

FRED S. JOHNSON,
Clerk.

(Seal)

Exhibit I.

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(DEFT'S EX. I.)

Certified Copy.

IN THE CIRCUIT COURT OF GRUNDY COUNTY,
Illinois.

People of The State of Illinois on the
relation of Charles S. Deneen, Gov-
ernor of said State,

vs.

Economy Light & Power Company.

The Answer of Economy Light & Power Company, Defend-
ant, to the Bill of the People of the State of Illinois on the
Relation of Charles S. Deneen, Governor of Said State,
Complainant.

ISHAM, LINCOLN & BEALE,
SCOTT, BANCROFT & STEPHENS,
Solicitors for Defendant.

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IN THE CIRCUIT COURT OF GRUNDY COUNTY,
Illinois.

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People of The State of Illinois on the
relation of Charles S. Deneen, Gov-
ernor of said State,
vs.
Economy Light & Power Company. }

The Answer of Economy Light & Power Company, Defend-
ant, to the Bill of Complaint of the People of the State of
Illinois on the Relation of Charles S. Deneen, Governor of
Said State, Complainant.

This defendant, reserving to itself all right of exception to
the said bill of complaint, for answer thereto says:

That as to so much and such parts of said bill as allege
that the title to the lands lying without the alleged meander
lines of Desplaines River through section 25, township 34
north, range 8, east of the third principal meridian, in
185 Grundy County, Illinois, and the lands lying in the bed
of the stream of said Desplaines River, through said sec-
tion 25, is in the State of Illinois, this defendant avers that
the People of the State of Illinois upon the relation of Charles
S. Deneen as Governor of the State of Illinois, are not the
proper parties to exhibit said bill, and this defendant avers
that if said lands have not been alienated by the State of Illi-
nois they remain a part of the canal lands, and under section
9 of the act of the legislature of the State of Illinois, entitled
"An act to revise the law in relation to the Illinois & Michi-
gan Canal and for the improvement of the Illinois and Little
Wabash Rivers," approved March 27th, 1874, in force July 1,
1874, it is made the duty of the Canal Commissioners of the
Illinois and Michigan Canal "to take all necessary proceed-
ings on behalf of the State to establish the title of the State
and to recover possession of any canal lands or real estate
owned by the State which may be claimed by or be in the
adverse possession of another person or party," and they
are thereby directed "when necessary for that purpose, to
cause appropriate suits in the name of the People of the
State of Illinois to be instituted and prosecuted therefor."
And this defendant avers that if the title to said lands out-
side of the alleged meander lines along the said Desplaines
River and in the bed thereof remains in the State, it only so

remains in the State in trust for canal purposes and the Canal Commissioners of the Illinois & Michigan Canal are the proper parties to cause said suit to be brought and to control the same, and that the Attorney General of said State upon the relation of Charles S. Deneen, the Governor thereof, 186 or otherwise, has no right, power or authority to institute or prosecute this suit without the express consent and direction of the Canal Commissioners of the Illinois & Michigan Canal; and said bill does not show that it is exhibited by or with the authority of said Canal Commissioners, but, on the contrary thereof, shows that it is not exhibited by or with their authority. And this defendant as to so much of said bill as alleges title to said lands outside of the meander lines along said Desplaines River, and in the bed of the stream, through section 25, to be in the State of Illinois, avers that there is a lack of proper parties complainant, and a lack of power or authority in the Attorney General of the State of Illinois to institute or prosecute said suit, and it prays the same advantages of this answer as if it had demurred to such parts of said bill upon the ground of want of proper parties, and lack of power or authority in the Attorney General of said State to institute or prosecute said suit.

And as to so much and such parts of said bill as charge that this defendant is a trespasser upon such lands, this defendant avers that said Attorney General has no right, power or authority to exhibit or maintain said bill in the name of the People of the State of Illinois upon the relation of Charles S. Deneen, the Governor of said State, or otherwise, but defendant avers that by virtue of the third clause of section nine of said act of March 27, 1874, entitled "An act to revise the law in relation to the Illinois and Michigan Canal and for the improvement of the Illinois and Little Wabash Rivers," the power and authority to cause suits to be commenced and prosecuted against persons trespassing upon canal lands

187 belonging to the State of Illinois is vested in the Canal Commissioners of the Illinois and Michigan Canal, and said bill does not show that it is exhibited by said Attorney General by or with the authority or consent of said Canal Commissioners, but, on the contrary thereof, shows said bill is not exhibited with their authority, and this defendant, as to so much and such parts of said bill as charge that this defendant is a trespasser upon the canal lands of the State, avers that the Attorney General of the State of Illinois has no lawful authority to exhibit said bill either in the name of the People of the State of Illinois upon the relation of Charles

S. Deneen, Governor thereof, or otherwise; and this defendant prays the same benefit of this defense as if it had pleaded or demurred to such parts of said bill upon that ground.

This defendant further avers that by the eighth section of said act of March 27, 1874, revising the law in relation to the Illinois & Michigan Canal, etc., said Canal Commissioners are given the control and management of the Illinois and Michigan Canal, including its feeders, basins and appurtenances and the property thereto belonging and that by the eighth clause of said section 8 there is vested in the Canal Commissioners of the Illinois & Michigan Canal full power and authority to lease canal lands or lots owned by the State, to sell and convey any canal lands or lots owned by the State, whenever in their judgment the interest of the State would be promoted thereby, and by section 3 of said act it is provided that suits may be prosecuted by them in the name of "The Canal Commissioners"; and defendant avers that if the flowage contract and lease, dated the 2nd day of September, 1904, Exhibits A and B, and the contract of August 8, 1905, Exhibit C, and the deed of January 6, 1905, Exhibit J, to said bill, or any or either of them, are void, the Canal Commissioners are the proper parties, and the only parties, who can maintain an action to set aside said contracts, lease and deed, or any or either of them, and that the Attorney General of the State of Illinois on the relation of Charles S. Deneen, the Governor of said State, or otherwise, has no power or authority to bring or maintain said action, but that any suit to set aside said contracts, leases and deeds can only be prosecuted by said Commissioners in the name of the Canal Commissioners of the Illinois and Michigan Canal; and said bill does not show that it is exhibited by or with the authority of said Canal Commissioners of the Illinois and Michigan Canal, but, on the contrary thereof, shows that it is not exhibited by or with their authority; and this defendant prays the same benefit of this defense as if it had specifically pleaded or demurred to so much and such parts of said bill as seek to have said contracts, leases and deeds declared null and void, for want of proper parties complainant, and for lack of power or authority in the said Attorney General to institute or prosecute said suit.

Defendant avers that as to so much of said bill as alleges that the said contracts, leases and deeds thereto attached, are null and void, the complainant has a complete and adequate remedy at law, and is not entitled to any relief from a court of equity, and the defendant prays the same benefit of

said defense as if it had pleaded or demurred to said bill of complaint therefor.

189 This defendant avers that said bill shows that the land outside of the alleged meander lines of the Desplaines River in section 25, township 34 north, range 8, east of the third principal meridian, in Grundy County, Illinois, and in the bed of said River in said section 25; and also that part of section 31, township 34 north, range 9, east of the third principal meridian, in Will County, Illinois, lying southwest and southeast of the Illinois and Michigan Canal and northeast and northwest of the Desplaines River (excepting a strip of land 90 feet in width on the southerly side of said Canal) are in the possession of this defendant under bona fide claim of title thereto deduced from the State of Illinois, and defendant avers that so much of said bill as alleges that the title to said lands is in the State of Illinois, and that the defendant is a trespasser thereon, involves the question of the title to said lands, which may be tried and determined at law, and with respect to which the complainant has a complete and adequate remedy at law, and is not entitled to any relief from a court of equity, and as to which the defendant is entitled to a trial by jury as guaranteed by the VII amendment to the Constitution of the United States and by section 5 of Article II of the Constitution of the State of Illinois; and this defendant prays the same benefit of this defense as if it had pleaded or demurred to so much of said bill of complaint as seeks to adjudicate the question of the title to such lands.

And this defendant further avers that by virtue of section 35 of Chapter 45 of the Revised Statutes of the State of Illinois this defendant is entitled to have its claim of title determined in two separate trials before two separate juries, 190 and defendant prays the same benefit of this defense as if it had demurred or pleaded the same in bar to said bill of complaint.

This defendant avers that said bill is an attempt to take the property of this defendant for public purposes, and that by virtue of Section 14 of Article XI of the Constitution of Illinois, this defendant is entitled to have its compensation for the property sought to be taken, fixed by a trial by jury, and it prays the same benefit of this defense as if it had pleaded or demurred to said bill on that ground.

Defendant further avers that said bill is multifarious in that it joins three separate and distinct causes of action:

1st. An alleged cause of action in which the State claims title to certain lands in fee in the capacity of private owner;

2nd. An alleged cause of action in which the State in its sovereign political capacity seeks to assert the rights of the public in an alleged public highway; and

3rd. An alleged cause of action in which the State in its capacity as private owner seeks to set aside certain contracts, deeds and leases which it claims were executed by the Canal Commissioners of the State of Illinois without authority.

And this defendant prays the same advantage of this answer as if it had demurred to said bill on the ground of multifariousness.

This defendant further says that the deed, leases and contracts mentioned in said bill, if voidable, could only be set aside upon restitution to this defendant of the consideration paid therefor by Harold F. Griswold, but the people do not in their said bill offer to return the said consideration.

This defendant admits that in the early history of our country a certain territory embracing what is now the States of Ohio, Indiana, Michigan and Wisconsin, was claimed to be owned by Virginia.

Admits that by certain acts of the legislature of Virginia, and by its deed of cession, said territory was conveyed to the United States, as is alleged in the second paragraph of said bill, and that on, to-wit, the 13th day of July, 1787, the Congress of the United States then existing under the articles of Confederation, enacted the ordinance commonly known as the ordinance of 1787.

Admits that section 14 of said ordinance provided that the Articles therein should be considered as articles of compact between the original states and the people and states in said territory, and should forever remain unalterable, unless by common consent, and admits that Article IV provided that "the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways, and forever, free, * * * without any tax, impost or duty therefor," and this defendant avers that it was also provided in said ordinance, in the fifth article thereof, that the states thereafter to be formed out of said territory should be admitted into the Congress of the United States "on an equal footing with the original states, in all respects whatever."

Admits that on the 18th day of May, 1796, Congress passed an act entitled "An Act providing for the sale of lands of the United States in the Territory Northwest of the River Ohio and above the mouth of the Kentucky River,"

and admits that section 9 of said act provided that "all navigable rivers within the territory to be disposed of by virtue of this act shall be deemed to me and remain public highways."

But this defendant alleges that said act, by the provisions thereof, did not relate to or affect the land in controversy in this bill, and that said act is wholly immaterial, irrelevant and impertinent to the issues sought to be raised by said bill, and to the relief prayed therein, and defendant prays the same benefit of this answer as if it had excepted or demurred to such portion of said bill upon those grounds.

Defendant admits the organization of Indiana Territory as alleged in said bill.

Defendant further admits that on the 26th day of March, 1804, Congress passed a statute entitled "An Act making provision for the disposal of the public lands in the Indiana Territory and for other purposes," and that by section 6 thereof it was provided that "all the navigable rivers, creeks and waters within the Indiana Territory shall be deemed and remain public highways."

This defendant admits that Congress, by its act of February 3, 1809, entitled "An act for dividing the Indiana Territory into two separate Governments," provided that that portion of Indiana Territory which now comprises the State of Illinois, for the purpose of temporary government, should constitute a separate territory to be called Illinois, and admits that it was provided in said act that there should be 193 established within such territory a government in all respects similar to that provided by the ordinance of 1787, and that the inhabitants thereof should be entitled to and enjoy all the rights, privileges and advantages granted and secured to the people of the territory of the United States northwest of the River Ohio by said ordinance.

Defendant further admits that on the 18th of April, 1818, Congress enacted a statute to enable the people of Illinois to form a constitution and state government, and for the admission of said state into the Union on an equal foot with the original states, and that said statute provided that said government should be republican, and not repugnant to the ordinance of 1787.

Defendant further admits that the people of the Illinois Territory adopted a constitution known as the constitution of 1818, the preamble of which recited that the people of the Illinois Territory, having the right of admission into the general government as a member of the Union, consistent with

the Constitution of the United States, the ordinance of Congress of 1787, and the law of Congress approved April 18, 1818, entitled "An act to enable the people of the Illinois Territory to form a constitution and state government, and for the admission of such state into the Union on an equal footing with the original states," did agree to form themselves into a free and independent state.

Defendant further admits that on December 3, 1818, the Congress adopted a resolution declaring the admission of the State of Illinois into the Union, and the said resolution declared, among other things, that the

194 "constitution and state government, so formed, is republican, and in conformity to the principles of the articles of compact between the original states and the people and the states in the Territory Northwest of the River Ohio, passed on the 13th day of July, 1787."

And this defendant avers that the second section of said resolution declared that the State of Illinois should be one of the United States of America "and admitted into the Union on an equal footing with the original states, in all respects whatever," and defendant avers that upon admission of the State of Illinois into the Union said ordinance of 1787 ceased to have, has not since had, and has not now, any operative force within her territory.

This defendant further admits that the River Desplaines is situated in said territory, but denies that it flows a distance of 96 miles through the Counties of Lake, Cook, Will and Grundy in Illinois.

This defendant further admits the allegations in paragraph III of said bill relating to the Kankakee River, but this defendant alleges that the allegations concerning the Kankakee River are wholly immaterial, irrelevant and impertinent to the questions sought to be raised by said bill and the relief prayed thereby, and defendant prays the same benefit of this answer as if it had pleaded or demurred thereto upon such grounds.

Defendant admits that the Desplaines River is wholly within the territory originally comprising what was known as the Northwest Territory, but denies that said river is subject to the provisions of the acts of Congress set forth in the bill.

195 Further answering, this defendant denies that it is shown by the history of the explorations and discoveries of the territory in what is now the northern part of Illinois, or otherwise, that at the time of the explorations and discov-

endant's
Exhibit I.

eries, or at any other time, the Desplaines River was navigable from a point near where is now situated the City of Chicago, or from any other point, to the mouth of said Desplaines in what is now Grundy County, or to any other point; and this defendant further denies that by the same history, or otherwise, it is shown that the portion of the Desplaines River last above mentioned was used in the early period of the State of Illinois as a highway for commercial purposes, and denies that commerce was carried on over said river, and denies that connection was made with the Chicago River by a short portage between the two rivers near the site of what is now the City of Chicago, and denies that it was in use as a highway of commerce leading from Lake Michigan and the waters emptying into the St. Lawrence, on the one hand, to the Illinois River, and the waters of the Mississippi on the other hand, thenceforward from the time of said first use, or from any time, up to and at the time when the said ordinance of 1787 and the several acts of Congress were respectively enacted.

This defendant further answering denies that the State of Illinois by and through its legislature and in obedience to the several acts of Congress set forth in said bill, or otherwise, assumed or took charge of the said Desplaines River, but admits that the State of Illinois did by a certain act mentioned in said bill, purport to authorize the building of a 196 toll bridge across the Desplaines River on the northeast quarter of section 11, township 39 north, range 12, east of the third principal meridian, and the southeast quarter of section 2 in said town and range, but denies that said act authorized the construction of two bridges, and avers that said act was not passed by virtue of or as a recognition of, any power of the state over said river, but merely to confer upon the persons therein mentioned the franchise to collect toll for traffic over such bridge, and avers that the place where said bridge was so authorized to be located, and was located, was not in that part of the river involved in this case, but was near the Village of River Forest in Cook County on that part of said Desplaines River which was declared navigable by the Legislature of Illinois by its act of February 28, 1839, entitled "An act declaring the Desplaines River a navigable stream."

And admits that afterwards the legislature of the State of Illinois passed an act entitled "An act to amend the several laws in relation to the Illinois & Michigan Canal," in force February 26, 1839, but denies that sub-section 9 of section 2 thereof provided

"that no stream of water passing through the canal lands shall pass, by the sale, so as to deprive the state from the use of such water, if necessary to supply the canal, without charge for the same."

Defendant's
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And denies that sub-section 11 of said act provided that "lands situated upon streams which have been meandered by the surveys of public lands by the United States shall be considered as bounded by the lines of those surveys and not by the streams,"

but defendant avers that it was provided in section 2 of said act that in all sales of lands and lots under the provisions of said act certain conditions should be annexed, and should compose a part of the contract, which conditions included the conditions set forth in sub-sections 9 and 11 of said section 2 above quoted.

And defendant avers that said bill does not allege that the use of any of the water of any stream passing through the lands described in said bill is necessary for the use of such canal; but defendant alleges that on the contrary thereof the use of such water is not necessary to supply the said canal, and that the said Canal Commissioners do not need or desire said waters for canal purposes; and defendant avers that if the use of such water was necessary to supply the canal, the Canal Commissioners would be the proper parties to take such steps as might be necessary to obtain such water, and that the people of the State of Illinois by their Attorney General upon the relation of Charles S. Deneen, their Governor, or otherwise, have no authority to bring or maintain any suit for the purpose of acquiring the waters of such streams for such purposes or otherwise.

And defendant denies that the lands for the Desplaines River were meandered by the survey of the United States.

Defendant avers that section 2 of said act of February 26, 1839, and sub-sections 9 and 11 of section 2, by the express terms thereof, only apply to sales by the Canal Commissioners of lands and lots theretofore authorized to be sold.

And this defendant avers that by the provisions of an act of the Legislature of the State of Illinois passed and in force February 21, 1843, entitled "An act to provide for the completion of the Illinois and Michigan Canal, and for the payment of the canal debt," granting to the Board of Trustees of the Illinois and Michigan Canal, the canal and canal lands, it was provided in section 18 thereof, that when said act should go into effect, so much of the acts theretofore passed by the Legislature of said State in relation to the

ndant's
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Illinois and Michigan Canal, and the canal lands and property, as conflicted with the provisions of that act, were thereby repealed; and this defendant avers that said sub-sections 9 and 11 of section 2 of the said act of 1839 were in conflict with the provisions of said act of February 21, 1843, and were thereby repealed.

And this defendant avers that by section 13 of said act of February 21, 1843, it was provided that sales of lands should be made in the manner prescribed in the act of the 9th of January, 1836, and this defendant avers that on such provisions as were contained in sub-sections 9 and 11 of section 2 of the act of 1839 were contained in said act of 1836.

This defendant further answering, admits that the Legislature of Illinois, by an act approved and in force February 28, 1839, declared the Desplaines River from the point where it most nearly connects itself with the Illinois and Michigan Canal, to its source within the boundaries of said State, a navigable stream, and declared that it should be deemed and held a public highway and should be and remain, free, open and unobstructed, from said point of connection with said canal to its utmost limits within said state for the passage of all boats and water-craft of every description.

And this defendant avers that said river was not in 199 fact navigable through the course described, or any portion thereof, and denies that the Legislature of said State could by its enactment impart to said stream the character of navigability which it lacked before the passage of said act; and defendant avers that said declaration was a recognition by the Legislature of the State of Illinois that said Desplaines River from the point where said river most nearly connects itself with said canal to its mouth was not navigable and defendant avers that the point where it is constructing its said dam is in that part of said river.

And this defendant, further answering, admits that the Legislature of the State of Illinois, by act of March 3, 1845, authorized Stephen Forbes to construct a dam across the Desplaines River in Cook County on the southwest quarter of section 36, township 39 north, range 12 east, and on the northeast quarter of section 2, township 38 north, range 12, east, in Cook County, Illinois; and that said statute contained the proviso:

"That this act shall not operate to prevent the State from improving said river by dams or from using the water in said river for the Illinois and Michigan Canal at any time hereafter, or for any other purpose";

and this defendant alleges on information and belief that said Stephen Forbes did, pursuant to this act, and on or about the year 1866, construct a dam across said Desplaines River on section 2, in township 38 north of range 12, east, and section 35, township 39 north of range 12 east, without any provision therein for the passage of boats, and he and his grantees and successors in title or interest have maintained said dam ever since, without any provision therein for the passage of boats, and that no boats ever could 200 or did pass said dam, from the date of the construction thereof down to the present time; and this defendant alleges that the place where said dam was authorized to be constructed, and was so constructed, was in that part of said Desplaines River which had theretofore been declared a navigable stream by the Legislature of Illinois; and that said act, authorizing the construction of said dam by said Stephen Forbes, and the construction of said dam were inconsistent with the use of said stream for the purposes of navigation, and that the said dam so constructed by said Forbes would have completely prevented the navigation of said stream if said stream had in fact been navigable.

This defendant further admits that the Legislature of the State of Illinois, by its certain law, entitled "An act authorizing the building of a bridge and road in township 36 north, range 10 east, in Will County," approved and in force February 12, 1849, authorized the construction of a bridge over the Desplaines River at Lockport in Will County, but this defendant avers that said act of the legislature authorizing the construction of said bridge is inconsistent with the use of said stream as a navigable stream, and defendant avers that the object of said act was to provide for the submission to the voters of said township 36 of the question of levying a tax for the purpose of improving the road from the canal bridge in the town of Lockport to some suitable point on the opposite bluff and constructing a bridge across said stream at Lockport upon said road, and not for the purpose of authorizing the construction of a bridge over a navigable stream.

This defendant further answering, admits that the Legislature of the State of Illinois, by its certain act entitled 201 "An act to create Sanitary Districts, and to remove obstructions in the Desplaines and Illinois Rivers," approved May 29, 1889, in force July 1, 1889, provided as is set out in said bill, and admits that section 23 of said act provided that

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said act should not be construed to authorize the injury or destruction of existing water-power rights.

And this defendant avers that the water-power rights which are involved in this cause were in existence at the date of the passage of said act and have since been acquired by this defendant, and that said act not only does not furnish the complainant any right to injure or destroy said right, but, on the contrary thereof, expressly prohibits the injury or destruction thereof.

Defendant further admits that it was provided in section 24 of said last mentioned act, that "whenever the general government shall improve the Desplaines and Illinois Rivers for navigation, to connect with this channel, said general government shall have full control over the same for navigation purposes."

And this defendant avers that said section 24 is a recognition by the Legislature of the State of Illinois that the Desplaines River is not a navigable stream.

This defendant further admits that the Legislature of the State of Illinois, on May 14, 1903, enacted a certain statute entitled "An act in relation to the Sanitary District of Chicago," etc., as is alleged in paragraph IV of said bill, but this defendant avers that said act of May 14, 1903, is wholly irrelevant, immaterial and impertinent, and shows no right, title or interest on the part of the relator, or the State of Illinois, or the people thereof, in or to the subject matter of said bill, or the relief prayed therein, and defendant prays the same benefit of this answer as if it had demurred therefor.

This defendant further answering, admits the organization of the Sanitary District known as the Sanitary District of Chicago, and the construction of the channel as alleged in paragraph IV of said bill, but alleges that said fact is wholly immaterial, irrelevant and impertinent, and prays the same advantage of this answer as if it had demurred therefor.

Defendant admits that afterwards the State of Illinois enacted a certain statute, approved December 6, 1907, and entitled "A bill for an act recognizing the Desplaines and Illinois Rivers as navigable streams, and to prevent obstructions being placed therein, and remove obstructions therein now existing." And that section 1 of said act provided:

"Be it enacted by the people of the State of Illinois represented in the General Assembly: That the Des Plaines and Illinois Rivers throughout their courses from and below the water-power plant of the main channel of the Sanitary Dis-

trict of Chicago in the township of Lockport, at or near Lockport, in the County of Will, are hereby recognized as and are hereby declared to be navigable streams; and it is made the special duty of the governor and of the attorney general to prevent the erection of any structure in or across said streams without explicit authority from the general assembly; and the governor and attorney general are hereby authorized and directed to take the necessary legal action or actions or remove all and every obstruction now existing in said rivers, that in any wise interferes with the intent and purpose of this act,"

203 But this defendant alleges that so much of said act as declares the rivers mentioned therein to be navigable streams, is unconstitutional and of no effect, inasmuch as the power to adjudge and declare the navigability of streams is vested exclusively in the judiciary; and the defendant further alleges that said act is unconstitutional in that:

1st. The body of said act is broader than the title thereof;

2nd. It confers upon the Attorney General and Governor of the State of Illinois judicial powers, to wit, the determination of what obstructions interfere with the intent and purpose of said act;

3rd. It deprives this defendant of its property without due process of law, in violation of the 14th amendment to the Constitution of the United States and Section 2 of Article II of the Constitution of Illinois;

4th. It denies to this defendant the equal protection of the laws in violation of the 14th amendment to the Constitution of the United States;

5th. It is a taking of the private property of this defendant without just compensation, in violation of Section 13 of Article II of the Constitution of Illinois;

6th. It is a special law laying out or opening a highway in violation of Section 22 of Article IV of the Constitution of Illinois.

7th. It is a special law affecting only property in and along the Desplaines River and not affecting other property similarly situated upon other streams, and is in violation of Section 22 of Article IV of the Constitution of Illinois.

This defendant admits that Charles S. Deneen is 204 the Governor referred to in said statute, but denies that he, by virtue and reason of said statute and the direction therein contained, or by virtue of his office as Governor and his constitutional duty to take care that the laws be faithfully

executed, or otherwise, has a special, or any, interest in the matters therein set forth.

Defendant denies that the Desplaines River has from the time when said ordinance of 1787 was passed, or from any other time, unto the present time or unto any other time, formed in its ordinary condition and by itself to the extent of its course, or otherwise, from the point of said alleged portage and connection with the Chicago River, or from any other point, to its mouth in Grundy County, or to any point or extent, a continued highway with water in sufficient volume and of sufficient depth to afford a channel for navigable and commercial purposes.

This defendant denies that the said Desplaines River from near the City of Chicago to the mouth of said river in Grundy County, or from any point to any other point, has been from the earliest knowledge of said river until the present time, or at any time, in law or in fact a navigable river, and denies that the several acts of the Legislature recited in said bill of complaint show the fact so to be, and denies that it is a fact, that it has been, or is the policy of the State to hold and maintain said Desplaines River to be a navigable river, and denies that said river is subject to the provisions of the several acts of Congress set forth in said bill, and denies that by reason of said acts the said Desplaines River has been, or
205 still continues to be, a highway of commerce, or that it is preserved for the use of the people of the State of Illinois, or the people of all the States of the United States, as a public highway; denies that it has not been alienated, and denies that the people of the State of Illinois have an easement over said river as a public highway for commerce, or otherwise, or that said river or the bed and waters thereof are permanently, or otherwise, impressed or burdened with said alleged easement or with a public right or public use of navigation, or otherwise, but this defendant alleges that on the contrary thereof there has never at any time been any navigation on said river of any kind or character and that said stream from its source to its mouth throughout its entire course is in fact incapable of being navigated.

Defendants avers that the said Desplaines River in its original or natural state or condition had not sufficient water for more than fifteen days in the year to float a canoe, and was not navigable in fact and was not capable of being navigated for purposes of commerce; that there never has been any navigation of said river for useful or commercial purposes; that from the point where the said river crosses the state line

between Illinois and Wisconsin, to the mouth of the stream said stream is a series of pools and shallows, and more nearly resembles a brook or rivulet than a river.

Defendant further avers that from Lockport to the mouth of the Desplaines River, a distance of about 18 miles, there is a fall of 90 feet, an average of 5 feet per mile; that approximately one-half the distance is composed of rapids and riffles; that between Lockport and Brandon's bridge, a distance of 7 miles, there is a fall of 34 feet, or about 4.6 feet per mile, and that between Jackson street and McDonough street, in the City of Joliet, a distance of 5,000 feet, there is a fall of 9 feet,—an average of 1.8 feet per thousand feet or over 9.5 feet per mile; and from McDonough street to Brandon's bridge, a distance of 2,000 feet, there is a fall of 3.75 feet or 9.9 feet per mile, and that along Treat's island, for a distance of 2,000 feet, there is a fall of 5.5 feet, or over 14.52 feet per mile, and that below that point, at a point called Smith's bridge, in a distance of 3,000 feet, there is a fall of 2 feet, or 7.92 feet per mile and that at Dresden Heights, where the dam of this defendant is being constructed, in a distance of 2,000 feet, there is a fall of 3.2 feet or 8.44 feet per mile; that from Jackson street, in the City of Joliet, to Brandon's road, a little over 2 miles, in the first 5,000 feet there is a fall of 9 feet, in the next 2,000 feet there is a fall of 3.75 feet; in the next 2,000 feet there is a fall of 5.5 feet, and in the next 3,000 feet there is a fall of 2 feet, making, in a distance of 12,000 feet, 20.25 feet fall, or an average of 8.91 feet per mile.

And defendant further avers that during times of freshets or high water which usually last only for very short periods varying from one day to two weeks, the current over said slopes is so swift that no boats could descend the river except at imminent peril to life and property, and that it would be wholly impossible for boats of any description carrying merchandise or otherwise, to ascend such river at such times.

Defendant avers that various dams and bridges have been erected over said stream as hereinafter set out, all of which were constructed without legislative authority.

That in 1833 a dam known as Beard's Dam was constructed across said Desplaines River near the mouth thereof, in Section 25, Township 34 North, Range 8, East of the Third Principal Meridian, in Grundy County, at substantially the same place where defendant is constructing its dam, without any provision therein for the passage of boats, and that said dam was maintained at said location for many years without an

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provision therein for the passage of boats of any kind or size, and that in fact no boats ever could or did pass through, over or around said dam.

That in 1835, or prior thereto, there were dams located across each channel of said Desplaines River in section 11, township 34 north, range 9, east of the third principal meridian and that said dams remained in said river many years.

And this defendant avers that said two dams last above mentioned were located upon odd-numbered sections, through which sections the state now claims that the shore and the bed of said stream were reserved from sale; and defendant avers that the said dams were constructed by the owners of the lands adjoining said stream upon either side, and were so constructed as an exercise of the right of ownership and dominion of and over the shores of said stream and the land in the bed thereof.

That in 1839 there was a dam built across the Desplaines River near what is now McDonough street in the City of 208 Joliet, which is sometimes called the Adam dam and sometimes Malcolm's dam, and that said dam remained in said river from said date until 1898 when it was removed by the Sanitary District of Chicago upon its paying as damages therefore a sum upwards of \$80,000.

That in the summer and fall of 1833 there was a dam built entirely across the river just south of what is now Cass street in the City of Joliet, which said dam remained in said river until 1841, when it was removed by the State of Illinois upon its paying as damages therefor the sum of \$17,655.

And defendant avers that said dam was constructed in said stream by the owner of the land abutting upon both sides of said stream and was so constructed by him in the exercise of dominion and ownership over the land abutting upon said stream and in the bed thereof; and defendant avers that if said Desplaines River was at the time of the removing of said dam a navigable stream, and the said dam was an obstruction to the navigation thereof, the said dam was in said stream without right or authority, and that the state could have removed said dam as a purpresture, without the payment of any damages therefor; and defendant avers that the action of the state in paying said damages was an admission that said stream was not navigable and that said dam was lawfully in said stream.

That in 1833 a dam known as Norman's dam, opposite where the state penitentiary is now located, was built across one channel of the Desplaines River.

That prior to 1839 there was a dam known as Daggett's dam built entirely across the river at Lockport.

209 That prior to 1847 there was a dam constructed across the Desplaines River in Lake County, Illinois, extending entirely across the river.

And this defendant avers that there were no provisions in any of said dams for the passage of boats, and that in fact no boats could or ever did pass any or either of said dams.

This defendant further avers that for many years there were no bridges across the Desplaines River, but that the river was forded at many points, and that afterwards bridges were established and are now located at the following points:

Smith's bridge in section 21, township 34 north, range 9, east of the third principal meridian;

The bridge known as the Millsdale bridge, located in section 11, township 34 north, range 9, east of the third principal meridian, near Millsdale in Will County, and that said bridge and the abutments thereof were constructed upon and over the shore and bed of the stream as an exercise of ownership and dominion over said land.

The bridge now known as Brandon's bridge, located in section 30, township 35 north, range 10, east of the 3rd P. M.;

Six bridges in the City of Joliet: one known as the McDonough street bridge, crossing the river at McDonough street, in Joliet; the Chicago, Rock Island & Pacific R. R. Co.'s bridge just north of McDonough street; the bridge across the river at Jefferson street; one at Cass street; one at Jackson street, and one at Ruby street in Joliet.

210 That there is also a bridge across the river in the township of Lockport, on the Lockport highway.

And this defendant avers that all of these bridges above mentioned are fixed bridges and have no provision for the passage of boats, and that boats cannot pass said bridges or any or either of them.

This defendant further avers that no legislative permits were ever granted by the State for the erection of any of the dams hereinabove enumerated, or for the location of any of the bridges hereinabove enumerated.

That in 1846 the State of Illinois completed the dam known as dam No. 1, entirely across the said Desplaines River, forming what is known as the Upper Basin of the Illinois and Michigan Canal, which dam is now in existence.

And that in 1841 the State of Illinois built the dam known as dam No. 2 in the vicinity of what is now Jefferson street, Joliet, extending entirely across the said Desplaines River

and forming the pool known as the Lower Basin of the Illinois and Michigan Canal; that said dam No. 2 remained in said river from 1841 until 1899, when it was removed by the Sanitary District of Chicago by and with the consent of the Canal Commissioners.

This defendant avers that by stipulation filed in the case of *Haven v. The Board of Trustees of the Illinois and Michigan Canal* in the Circuit Court of Will County, tried at the October term, 1848, of that court, it was admitted by the Canal Trustees that the Desplaines River was not navigable in fact, although a portion of it had been declared to be so by act of the Legislature.

Defendant avers that in a proceeding brought in the Circuit Court of Will County, Illinois, by the Sanitary District of Chicago against William J. Adams, the dam hereinabove referred to as the Haven dam, together with the water-power rights connected therewith, was taken by said Sanitary District by virtue of the Eminent Domain Law of the State of Illinois, and the said Circuit Court in said proceedings adjudged and decreed that the defendants in said case had a valuable property right in the said dam, and the water-power thereby created, and awarded said defendants a large sum as compensation therefor, and for other property connected therewith, and that said case was, on appeal, affirmed in the Supreme Court of Illinois; and this defendant avers that said judgment of the said Circuit Court and said affirmance in the Supreme Court were in effect a finding that said dam was lawfully in said stream, and that no easement of navigation or otherwise existed therein.

This defendant admits that by act of Congress approved March 2nd, 1827, there was granted to the State of Illinois, every alternate section in a strip of land ten miles wide along the line of the Illinois and Michigan Canal "for the purpose of aiding the opening of a canal to connect the waters of the Illinois River with those of Lake Michigan," as is alleged in paragraph V of said bill, and admits that among the lands thus conveyed by Congress, was section 25, in Township 34 north, range 8, east of the third principal meridian, in Grundy County, Illinois.

212 This defendant admits that the Desplaines and Kankakee Rivers unite and form the Illinois River in the southeast quarter of said section 25, but denies that by the survey of public lands by the United States said Desplaines River was meandered, and denies that the purchasers from the State of Illinois of lands in said section 25 or in other

similarly situated land with reference to the Desplaines River, did not take, or did not claim to take, under their several purchases, that portion of said lands lying between the alleged meander line of the Desplaines River and the waters of said river, and denies that said land between said alleged meander line and the waters of said river have never been used by any individual under any claim of authority or right vested in the purchasers of said lands from the State, save and except as claimed by the defendant.

Denies that the land lying between the alleged meander line of the Desplaines River and the waters of said river in the southeast quarter of said section 25, together with the bed of the stream of the said Desplaines River in said quarter section of land last above described or in other lands similarly situated with reference to the Desplaines River, or either or any of such lands, have not passed by purchase from the State of Illinois, and denies that the same, and each and every or any part thereof, is owned by the State of Illinois, or held by the State for the use and benefit of the people of the State or the people of the United States as a public highway for commerce, or otherwise.

But, on the contrary thereof, this defendant alleges that the purchasers from the Board of Trustees of the Illinois and Michigan Canal of lands donated to the State by the 213 United States for the purpose of aiding in the opening of a canal to connect the waters of the Illinois River with those of Lake Michigan, did by virtue of their several deeds and purchases, acquire all the right, title and interest of the State in and to all of the land described in their respective deeds, including the land between the alleged meander lines and the waters of streams running through said lands, and in the beds of said streams, and have always claimed title thereto, and that their title to the lands between the alleged meander lines and the waters of said streams and in the beds of said streams have always been recognized, and that the lands between said alleged meander lines and the banks of said streams have been used and cultivated by the purchasers of the lands through which said streams pass down to the banks of such streams, without reference to any alleged meander lines, from the dates of their respective purchases to the present time.

And this defendant admits that the trustees of the Illinois and Michigan Canal executed and delivered to one Charles E. Boyer, a deed bearing date the 22nd day of October, 1860, for the south fraction of the northwest quarter and the north fraction of the southeast quarter and the north fraction of

the northwest quarter, and the south fraction of the southeast quarter of said section 25, in township 34 north, of range 8, east of the third principal meridian, excepting and reserving so much of said tract as was occupied by the canal and its waters, and a strip 90 feet wide on either side of said canal, said tract containing 196.62 acres and being a portion of the land granted by the United States to the State of Illinois to aid said State in opening a canal to connect the waters of the Illinois River with those of Lake Michigan, and by said State granted to said Board of Trustees of the Illinois and Michigan Canal for the purposes set forth in the act of said State, of February 21st, 1843.

And this defendant denies that no part of the land in the northwest quarter and in the southeast quarter of said section 25, situated outside of the alleged meander line of the Desplaines River, were conveyed by said deed of the Board of Canal Trustees to said Charles E. Boyer, and denies that the same remained the property of the State of Illinois; but, on the contrary thereof, this defendant avers that said deed from the Board of Trustees to said Charles E. Boyer was a conveyance by said trustees to said Charles E. Boyer of all the lands belonging to the State of Illinois in the subdivisions therein described, including the land situated outside of said alleged meander line, and the land lying in the bed of the stream of the Desplaines River, and that the title to all of said lands passed to the said Boyer by virtue of said conveyance.

This defendant admits that its claim to said premises so situated outside of the alleged meander lines of the Desplaines River in said section 25, is based upon mesne conveyances from the said Charles E. Boyer, and the several leases and contracts attached to said bill.

Defendant admits that on March 2nd, 1827, Congress passed an act entitled "An act to grant a quantity of land to the State of Illinois for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," as alleged in said bill, and that said act provided that "the lands shall be subject to the disposal of the Legislature of the said State for the purpose aforesaid and no other."

This defendant admits that by the act of March 2nd, 1827, Congress granted by implication the right of way for the construction of said canal through the sections of public land which were not donated to the State, and that the said grant of right of way by implication extended to the land necessary to be used for the canal of the width contemplated.

The defendant further admits that afterwards such proceedings were had pursuant to law and said statute, that the route and location of the canal were duly surveyed and laid out, and the odd-numbered sections of land upon the survey of the same duly selected by the commissioner of the land office, as alleged in said bill.

Denies that Artemus J. Mathewson, under the authority and direction of the Canal Trustees, surveyed and marked lines of a 90-foot strip on each side of the canal as finally located and constructed, from one end of said canal to the other, or that he filed in the office of said Board of Trustees maps and profiles of said survey and of said 90-foot strip; and denies that he had any lawful authority so to do.

Admits that a strip of land ninety feet in width on each side of the canal as aforesaid, was reserved from the sale by the Canal Commissioners and the Canal Trustees in many of the sales of canal lands in odd-numbered sections, and that the title thereto remains in the State of Illinois, but

denies that said strip, together with the lands necessary 216 for the right of way through the alternate even-numbered sections of said land through which said canal is constructed, constitute integral parts of the canal, or that they are necessary for its preservation and use, or that they are by law preserved and protected against alienation, but on the contrary thereof avers that said Canal Commissioners are expressly authorized by law to sell and convey any portion of said 90 foot strip excepting such portions thereof as are now utilized in connection with the use of water power upon the said canal or the sale of which would prevent or interfere with the proper use and operation of the said canal as a waterway, but admits that the 90-foot strip was expressly reserved from sale in said deed of the trustees of the Illinois and Michigan Canal to said Boyer.

Defendant believes that the exhibits attached to said bill are substantially accurate copies of the originals of which they purport to be copies, but it does not admit that they are true copies.

This defendant admits that the Canal Commissioners of the State of Illinois entered into a certain contracts bearing date the 2nd day of September, 1904, with one Harold F. Griswold, a purported copy of which is attached to said bill and marked Exhibit 9, and admits that the said contract was assigned by the said Harold F. Griswold to this defendant.

This defendant further admits that the said Canal Commissioners entered into a contract of lease with one Harold F.

defendant's
Exhibit I.

Griswold as of the date of September 2, 1904, copy of which is attached to said bill and marked Exhibit B, and admits that said Harold F. Griswold assigned the said contract to this defendant.

217 This defendant further admits that the Canal Commissioners entered into another certain contract with Harold F. Griswold, as of the date of the 8th of August, 1905, a purported copy of which is attached to said bill and marked Exhibit C, and admits that said Harold F. Griswold assigned the said contract to this defendant.

This defendant admits that said Canal Commissioners made an application to the Governor of the State of Illinois for his consent to the sale of certain lands, which application bears date the 11th day of June, 1904, a purported copy of which is attached to said bill and marked Exhibit D, and that a purported copy of the approval of said application by the Governor as of the 14th day of June, 1904, is attached to said bill, marked Exhibit E.

This defendant admits that a certain notice of proposed sale was inserted in the Lockport "Phoenix Advertiser," as is alleged in said information, but that the sale so advertised to be made was adjourned and never thereafter resumed.

Defendant further admits that after the 2nd day of August, and under date of September 2, 1904, the Canal Commissioners entered into the agreement and lease hereinabove mentioned respectively as Exhibits A and B, and that afterwards, and under date of November 1, 1904, the Canal Commissioners of the State of Illinois made an application to the Governor for his consent to the sale of certain lands described in said application, a purported copy of which is attached to the bill, marked Exhibit G, and that the approval of said

218 application for sale by the Governor was made in writing, a purported copy of which, bearing date the 2nd day of November, 1904, is attached to said bill, marked Exhibit H; that pursuant to said application and approval, notice of sale was inserted in the Lockport "Phoenix Advertiser," as alleged in said bill.

Defendant admits that pursuant to said application last above mentioned, and the approval of the Governor thereof, and of the advertisement in the Lockport Phoenix Advertiser last above mentioned, the said Canal Commissioners sold the lands therein mentioned, and executed a certain deed to Harold F. Griswold as of the date of January 5, 1905, a purported copy of which deed is attached to said bill marked Exhibit J,

and admits that said Harold F. Griswold conveyed said premises so that by mesne conveyance said premises passed to this defendant.

Defendant
Exhibit

This defendant further admits that said Canal Commissioners entered into a contract of lease with Harold F. Griswold as of the date of December 2, 1904, a purported copy of which is attached to said bill and marked Exhibit K and made a part thereof, and that said lease was assigned by Griswold to this defendant.

This defendant admits that by virtue of the several deeds, leases and contracts mentioned in said bill, and also by virtue of its ownership of the bed and shore of the Desplaines River, it claims a right to construct a dam across the Desplaines River and across the lands adjacent thereto, and across the 90-foot strip of land, and immediately adjoining the waterway of said Illinois & Michigan Canal and up to the bank or towpath of the said Illinois and Michigan Canal, and to construct said dam so as to flood the lands along the Desplaines River for a distance of several miles above the location of said proposed dam, and on the southeast quarter of said section 25, but denies that said 90-foot strip of land is used for canal purposes, and avers that said 90-foot strip of land through said southeast quarter section has not heretofore been used for any purpose whatsoever either by the Canal Commissioners or by any one pursuant to the authority granted by them, or otherwise, and that said land was swampy, unfit for cultivation, partially covered with water, and unproductive of revenue.

This defendant further avers that during the year 1904, one Charles A. Munroe and associates acquired, in connection with the land purchased and leased from the Canal Commissioners under the various instruments from the said Canal Commissioners to Harold F. Griswold, referred to in said bill, by purchase from the owners thereof, some 1,800 acres of other lands, at an expenditure of upwards of \$200,000, the ownership of which gave to said Munroe and associates the right to construct a dam at the mouth of the Desplaines River with a crest at such a height as would back the level of the waters of the Desplaines River to the level of the waters of Lake Joliet, and defendant avers that at the time of the making of said leases, deeds and contracts, the said Canal Commissioners knew that the said Munroe and associates had acquired and were acquiring a large amount of other lands at a large expenditure of time and money, for the purpose of utilizing the same in connection with the lands so acquired from

Defendant's
Exhibit I.

said Canal Commissioners, for the purpose of creating water power.

220 Defendant avers that before the beginning of the construction of its said dam and in order that said dam might be located at such a point as would contribute to a waterway, if one should ever be constructed in said stream, one Charles A. Munroe submitted the plans of said proposed dam to said War Department, of the United States, and requested that said Department would give some expression of opinion as to whether the plans submitted would be in harmony with the work of improvement proposed by the United States Government, to-wit, the construction of a navigable waterway from Lockport, Illinois, to St. Louis, Missouri, via the Desplaines, Illinois and Mississippi Rivers, and that thereupon the Chief of Engineers of the United States Army referred the matter to Lieut. Col. W. H. Bixby, of the Corps of Engineers of the United States Army, in charge of the district in which said proposed work was to be constructed, to examine said plans and said proposed work and to report his recommendations thereon; that thereupon the said Bixby reported to the Chief of Engineers of the United States Army as follows:

of
H. Bixby,
Mar.
1906.

“United States Engineer Office,
508 Federal Building,
Chicago, Ill., March 27, 1906.

Brig. Gen. A. Mackenzie,
Chief of Engineers, U. S. Army,
Washington, D. C.

General:

I. In reply to Department letter (E. D. 58726) dated March 16, 1906, as to the proposed plans of a water power company for a dam across the Des Plaines River, Ill.,
221 just above its mouth, which have been verbally and informally presented to your office by the Hon. H. M. Snapp and the water-power representatives, I have herewith to submit report as follows:—

2. The dam in question is that proposed by Chas. A. Munroe, of Chicago, Ill., as explained by his letter to this office under date of March 20, 1906, with inclosures (copies herewith—2 letters, 3 blue-prints). (5 incls.)

3. The Des Plaines River, so far as now known to this office, has never yet been considered a navigable stream of the United States. It is therefore apparently as yet subject only

Report of
W. H.
dated
27. 1905

to such jurisdiction as applies to all other unnavigable streams and not subject to the provisions of Sections 9-13, Act of March 3, 1899, or to other similar U. S. legislation.

4. The agents of the water power company in question, informally claim to have secured possession of all the land on each bank of the river necessary to allow for construction of the dam and of its accessories, and to protect themselves from all future claims for over-flowage created thereby, so far as any existing known rights are concerned, and the likewise claim that there is no existing State law, or United States law which prohibits their legally going ahead with their proposed construction and that no special law is needed therefor. They admit, however, that in some minor matters, they still lack necessary authority from the local Board of Supervisors, to condemn certain properties which they still wish to acquire in order to facilitate or simplify their future work (such permission, however, not being absolutely essential to such work) and they state that the Board of Supervisors are willing to grant such authority as soon as it is evident that the proposed power dam construction will not interfere with the future development of the river for navigation purposes.

222 5. The water power company agents likewise state that their object in bringing the matter up before the War Department at present, is to make evident that the proposed dam construction not only does not conflict with any existing U. S. law, but also will assist rather than injure the possible future navigation of the Desplaines and Illinois Rivers, should the improvement of such rivers ever be authorized by Congress in the manner proposed by the last Board Report of August 26, 1905, upon the feasibility and cost of a navigable waterway from Lockport, Ill., to St. Louis, Mo., via the Desplaines, Illinois, and Mississippi Rivers (House Document No. 263, 59th Congress, 1st Session); and they desire to secure from the War Department some expression of opinion, informal or otherwise, so far as it can properly be given, that will allow them to assure all inquirers that the War Department so understands the situation, and is making no objection to such prompt progress of the work as is necessary to a business enterprise of its magnitude and importance.

6. Paragraph 17 of the Board Report of August 26, 1905, above referred to, specially stated that the plan submitted by the Board was "not designed to develop water power, but there will probably be no difficulty in modifying it so as to

Test of
H. Bixby,
2d Mar.
1906.

confirm to such development if those who are to benefit thereby will co-operate with the Government. They should pay the cost of the dams, and the damage from flowage, which is no more than they would be compelled to do if the Government made no improvement." The plans herewith submitted by Mr. Munroe show plainly a proposed co-operation such as that described in the above Board report, offered in such manner as not only to pay the cost of this power dam, and to protect the United States against flowage damage, but also to lessen by one the number of locks and dams necessary for future navigation and to otherwise save both time and money (\$142,385 in first cost, and \$4,000 annually thereafter for maintenance and operation) to the United States, in 223 case Congress should finally decide to undertake the improvement covered by the August 26, 1905, Board report, or to otherwise make this river navigable in this neighborhood. All information, so far received by this office, appears to substantiate the statements of Mr. Munroe, as described above; and I consider that his proposition should be encouraged and that he should receive from the War Department whatever expression of favorable consideration may be proper and allowable under such circumstances.

7. I have carefully considered the question of this power dam project and have talked it over at intervals with Mr. Woermann, while he was Assistant Engineer in local charge of the Illinois River survey under this office before he had been employed by Mr. Munroe, as well as since that time, and have discussed the matter also with Mr. Munroe; and I believe that the provisos of the next paragraph below are fair and advantageous to both sides, and will leave to the future only the question of regulating pool levels so as to avoid a conflict between depths of water needed for navigation and heads of water needed for power purposes, and so as to divide up the river water between the two according to such rights as may exist when the river shall become a navigable water (which it appears not to be at present), and when the United States shall decide to give up the use of the canal and to assume the improvement of the river. Until such time, I do not see how the War Department can assume any definite jurisdiction of the Desplaines River or make any definite demands upon any water-power company already organized for the use of this river. It is my present understanding that these provisos will be accepted by Mr. Munroe.

Report of
W. H.
dated
27, 1906

8. I have therefore to recommend that the Hon. H. M. Snapp and Mr. Charles A. Munroe be informed that the War Department will waive any and all objections which it may have to the progress of such water power dam construction as proposed by Mr. Munroe's letter of March 20, 1906, 224 and its inclosures, provided that he, on the part of the power dam owners, agrees

(a) that he will construct and maintain in good repair, just above the mouth of the Des Plaines River, in location as approximately shown on the blue prints, a dam and spillway sufficient to hold the water surface of its upper pool at a height equal to the present mean level of Lake Joliet (taken at 512.0 feet, Memphis datum); and later whenever Congress shall have ordered the improvement of the Des Plaines River for navigation purposes, will raise this dam 3.0 feet higher (giving pool level of 515.0 feet, Memphis datum) if the War Department shall so order; and will grant the United States the use of such pool so far as needed for navigation;

(b) that he will assume the cost of, and protect the United States from, claims for all flowage damages caused by this dam between its site and the north line of Section 11, Township 34, Range 9 East, which line is about 1.5 miles by river above the next higher lock and dam proposed by the Board report (i. e., Lock No. 4 and Dam. No. 2, at the foot of Treat's Island;

(c) that he will grant to the United States a strip of land at least 150 feet wide across the north end of this dam, to be so located between it and the tow path of the present Illinois and Michigan Canal, as to connect the present mid river above, to the same below, in the manner approximately indicated on the accompanying blue prints; such strip to be used by the United States for the construction and maintenance of a boat lock, its necessary approaches, and other purposes of navigation;

(d) that he will do all the above, free of cost to the United States;

Provided, that the War Department will waive any and all objections which it may have to the progress of such water power dam construction.

Very respectfully,

W. H. BIXBY,
Lt. Col., Corps of Engineers."

225 that thereupon the Chief of Engineers of the United States Army concurred in said recommendation and reported the result of his findings and his recommendations to the Secretary of War, and thereupon and on or about the 7th day of June, 1906, the War Department, by Robert Shaw Oliver, Assistant Secretary of War, send to said Charles A. Munroe, a letter reading as follows:

1906.

“War Department,
Washington, June 7, 1906.

Sir—

In reply to your letter of June 5, 1906, addressed to the War Department, in the matter of the construction by yourself and associates of a dam and spillway across the Desplaines River near its mouth, at the location and as shown on maps submitted, with your letter of March 20, 1906, addressed to Lieutenant Colonel W. H. Bixby, Corps of Engineers, U. S. Army, I have the honor to advise you as follows:

It is understood that yourself and associates are willing to comply with the following conditions, viz.:

First. That the details of construction shall be such as to insure permanency and of sufficient capacity to hold the water surface of its upper pool at a height equal to the present mean level of Lake Joliet (taken at 512.0 feet Memphis datum); and later whenever Congress shall have ordered the improvement of the Desplaines River for navigation purposes, the dam shall be raised by you and your associates 3.0 feet higher (giving pool level of 515.0 feet, Memphis datum), if the War Department shall so order; the United States and the public to have the free use of such pool so far as needed for navigation purposes, and the use of water for power purposes shall be so limited that the level of the
226 pool shall at no time be reduced below that adopted for navigation in the plans of the United States for the slack-water improvement of the river.

Second. That the United States shall be protected from claims for all flowage damage caused by the dam between its site and the north line of section 11, township 34, range 9 east, which line is about 1.5 miles by river above the next higher lock and dame proposed by the board of engineers' report (i. e., Lock No. 4 and dam No. 2 at the foot of Treats Island).

Third. That there shall be conveyed to the United States free of cost a strip of land at least 150 feet wide across the north end of this dam, to be so located, between it and the tow path of the present Illinois and Michigan canal, as to con-

Letter.
June 7

nect the present mid-river above to the same below in the manner approximately indicated on the accompanying blue prints; the right of the United States to enter upon and use such strip of land for the construction and maintenance of a boat lock, its necessary approaches, and for other purposes of navigation, if it so desires, without liability for damages resulting in any way from its operation in connection with construction or maintenance of said lock and appurtenant works to be duly guaranteed.

If these conditions are complied with, in the opinion of the Chief of Engineers, U. S. Army, concurred in by this department, the work proposed is in general harmony with the work of improvement recommended by the Board of Engineers appointed under authority of the River and Harbor Act of June 13, 1902 (32 Stat. L., 331, 364), in its report dated August 26, 1905, printed as House Document No. 263, 59th Congress, first session.

Inasmuch, however, as Congress has not as yet authorized the improvement of this river, this department does not deem it expedient to take further and definite action in the matter of approving the plans.

Very respectfully,

ROBERT SHAW OLIVER,
Assistant Secretary of War.

Mr. Charles A. Monroe,

The Rookery, Chicago, Illinois."

And defendant avers that afterwards, to-wit, on or about the 15th day of December, 1906, this defendant acquired from the said Munroe and associates, all the lands and rights so acquired by them, including the leases, deeds and contracts from the said Canal Commissioners to said Griswold, set forth in said bill, and that at the time it so acquired the said lands and rights it paid full consideration therefor without any notice or knowledge of any claim that the said leases, contracts and deeds from the said Canal Commissioners to the said Harold F. Griswold were invalid, and that at said time, and before the payment of the consideration therefor, the said Canal Commissioners had knowledge that this defendant was so acquiring said lands and rights.

This defendant further avers, and states the fact to be, that after said lands were so acquired by it, it immediately entered in and upon the work of constructing its dam at the mouth of said Desplaines River, procured complete plans and drawings of the proposed work, and entered into a con-

t's
t 1. tract for the construction of said dam at a cost of upwards of \$500,000, and entered into a contract for the purchase of hydraulic machinery to the amount of \$145,000, upon which it has already paid the sum of \$52,500, and has become liable for the balance thereof, and defendant avers that the 228 State of Illinois, with knowledge that this defendant was proceeding with the construction of its said dam at great expense relying upon the validity of said deeds, leases and contracts, having stood by and permitted this defendant to make large outlays of money and incur heavy liability in and about the construction of its said dam, without protest or notice that it claimed that said leases, contracts and deeds were invalid, is now estopped to claim that they are invalid; but defendant denies that said several leases, deeds and contracts are ineffectual to confer any right to build or maintain said dam, but avers that said leases, deeds and contracts confer upon this defendant, full right, power and authority to construct and maintain said dam.

And defendant further avers that the earthen portion of said dam which occupies the space between the power-house and the Illinois and Michigan Canal, and which said space is reserved for the construction of a lock, has been entirely completed; that the space between said earthen dam and the Desplaines River has been excavated to a depth of, to-wit, 20 feet, and that from the north bank of said Desplaines River to the center, a distance of 500 feet, the river has been enclosed in a coffer dam; that in connection with said work, the said contractor has erected some 17 buildings, and has, and had on the ground at the time the injunction was issued in this case, engines, derricks, cars, boats, stone, cement, lumber, and material, to the amount of \$150,000.

And defendant avers that the plans upon which it was proceeding to construct its said dam at the time of the enter- 229 ing of the temporary injunction herein were the same plans which were so submitted to the War Department and defendant avers that it proposes and intends to construct its said dam in accordance therewith; that it proposes to build its dam of such details of construction as shall insure permanency and of sufficient capacity to hold the water surface of its upper pool at a height equal to the present mean level of Lake Joliet (taken at 512.0 feet Memphis datum); and that whenever Congress or the State of Illinois shall authorize and undertake the improvement of the Desplaines River for navigation purposes it proposes to comply with all the conditions

specified in said letter to the end that its dam and works shall be in harmony with and will not obstruct such improvement.

This defendant further answering, denies that the General Assembly of the State of Illinois, has, by resolution duly passed by the Senate, and concurred in by the House of Representatives, on the 16th day of October, 1907, a purported copy of which is attached to said bill, proposed the building of a deep waterway, commencing at the southern end of the Chicago Drainage Canal and extending southwesterly along the line of the Desplaines and Illinois Rivers in accordance with plans and specifications formulated by the corps of engineers of the U. S. Army under and by direction of a certain act of the Congress of the United States; but avers that the General Assembly did by said resolution propose to submit to the electors of the State of Illinois a proposition to amend the Constitution of said State in the manner stated in said resolution, but defendant admits that in case a deep waterway

is built in said Desplaines River, locks and dams with
230 special provisions for navigation, and securing and safeguarding the passage of boats will necessarily be constructed across said deep waterway in the channel of the Desplaines River at or near the location of the site of this defendant's dam, and that such a dam would afford water power of great value; but denies that any water power which might be created thereby will be lost to the State of Illinois if defendant shall be permitted to construct the dam herein mentioned, but, on the contrary thereof, this defendant avers that the state has no water power or right or title thereto upon the said southeast quarter of section 25; but this defendant avers that the water power existing upon the southeast quarter of said section 25 belongs to this defendant, and that the legislature of the State of Illinois has no right, power or authority to create water power and no right, power or authority to take the property of this defendant for that purpose.

And this defendant avers that the act of the legislature of the State of Illinois, passed on the 6th day of December, 1907, entitled "A bill for an act recognizing the Desplaines and Illinois River as navigable streams and to prevent obstructions being placed therein, and to remove obstructions therein now existing," and the joint resolution of the General Assembly, a purported copy of which is attached to said bill and marked Exhibit L, is an attempt upon the part of the said state to take to itself, without compensation to this defendant, the water power of this defendant, and that the resolution of the General Assembly hereinabove mentioned in so far

is it attempts to provide for the construction of a deep water-way along the Desplaines River and the creation of water
231 power therein, is a violation of the rights of this defendant in and to the bed and shores of said stream in the southeast quarter of said section 25, and is a taking of the private property of this defendant without due process of law in violation of the XIV amendment of the Constitution of the United States and section 13 of Article II of the Constitution of Illinois, and is special legislation in violation of Section 22 of Article 4 of the Constitution of Illinois.

This defendant further answering, avers that by the act of cession of the State of Virginia, of December 20, 1783, and the deed of cession of March 1, 1784, executed pursuant thereto, the State of Virginia did convey, transfer, assign and make over unto the United States for the benefit of the said states, Virginia inclusive, all right, title and claim as well of soil as of jurisdiction, which the said Commonwealth then had to the territory or tract of country within the limits of the Virginia charter, situated, lying and being to the northwest of the River Ohio, to and for the uses and purposes, and on the conditions in said act recited, among which was the condition that the states formed out of said territory should be republican states, and should be admitted members of the Federal Union, with the same rights of sovereignty, freedom and independence as the other states, and that the lands within the territory so ceded to the United States should be considered as a common fund for the use and benefit of such of the United States as had become members of the Confederation or federal alliance of the said states, Virginia inclusive, according to their several respective proportions in the general
232 charge and expenditure, and should be faithfully and bona fide disposed of for that purpose, and for no other use or purpose whatever.

And this defendant avers that the land in said section 25 hereinabove described was among the lands so conveyed by the State of Virginia to the general government; and this defendant avers that by virtue of said act and deed of cession the general government of the United States acquired and held all of the lands thereby conveyed, in trust, for the benefit of all the states of the United States, Virginia inclusive, according to their usual respective proportions in the general charge and expenditure, and had no right or authority to use or convey said lands for any other use or purpose whatsoever.

And this defendant avers that the United States, holding

said lands in trust as aforesaid, did by its act of March 2, 1827, grant to the State of Illinois, among other lands, section 25 in township 34, range 8, east of the third principal meridian, in what is now Grundy County, Illinois for the purpose of aiding the said state in opening a canal to unite the waters of the Illinois River with those of Lake Michigan, and provided in said act that the said lands should be subject to the disposal of the legislature of the state for that purpose, and no other.

And this defendant avers that the state thereafter, by virtue of said act, held the said lands, including section 25 aforesaid, in trust for the purposes therein expressed, and no other, and that the said state had no right or authority to divert the said section 25, or any portion thereof, from the uses for which the same were granted by the United States and had no authority to retain, use or devote the bed of 233 the Desplaines through said section 25, or the lands bordering upon said stream within the alleged meander lines thereof, for any purpose other than the construction of said canal, and that the application of said lands to any purpose other than those upon which the grant was made, would be a violation of the trust upon which said lands were granted by the general government to said state, and would be a violation of the trust upon which the United States took and held said lands by virtue of the act and deed of cession of the State of Virginia above mentioned.

Defendant avers that in the year 1842, the State of Illinois, after having expended nearly \$5,000,000 upon the construction of the Illinois & Michigan Canal, and finding the same far from completion; its treasury empty; the interest upon its bonds, and other indebtedness, long past due, and unpaid; a large portion of the canal lands sold, and the proceeds expended in the construction of said canal, and a large indebtedness, in addition thereto, incurred in the construction of the same; and the value of the remaining canal lands entirely inadequate at their then value to complete the canal at the estimated cost thereof, and no one willing to extend her further credit upon her own faith,—applied to some of the large holders of her canal bonds and indebtedness for a further loan for the purpose of completing the construction of said canal; and after considerable negotiations with various large holders of her bonds and indebtedness, some of those holders offered to subscribe to a loan to the state to the amount of \$1,600,000 for the purpose of completing said canal upon the

Defendant's
Exhibit

condition that the state should convey to trustees for the
234 benefit of the subscribers to said loan, all of her canal
lands, town lots, water power, coal beds, stone quarries,
and all of the canal property, together with all of the tolls that
might be derived from transportation upon the canal, and, in
addition thereto, that the state would at the next session of
its legislature, adopt and establish a system of revenue by
which provision should be made for the prompt and continuous
payment of part of the accruing interest upon the whole
state debt, and should also provide for the gradual payment
of the arrears of interest then due and of such arrears as
should thereafter accrue from her then inability to pay the
whole interest at its exact maturity; and thereafter, pursuant
to said offer, the legislature of the State of Illinois, at its
session in 1843, passed an act entitled "An act to provide for
the completion of the Illinois & Michigan Canal and for the
payment of the canal debt," approved February 21, 1843,
section 1 of which provided that for the purpose of raising a
fund for the completion of the Illinois & Michigan Canal, "the
Governor of this state, be, and is hereby fully authorized and
empowered to negotiate a loan solely on the credit and pledge
of the said canal, its tolls, revenues and lands" to be granted
to the trustees as thereafter provided, of \$1,600,000.

And section 10 of said act provided that "for the purpose
of placing in the hands of trustees full and ample security for
the payment of said loan authorized by this act, and the interest
thereon, as well as for securing a preference in the payment
of such canal bonds and other evidences of indebtedness
issued by this state for the purpose of aiding in the
235 construction of the Illinois & Michigan Canal, as may be
owned by the subscribers to the said loan, the state does
hereby irrevocably grant to the said Board of Trustees of the
Illinois and Michigan Canal, the bed of said Illinois & Michigan
Canal, and the land over which the same passes, including
its banks, margins, towpaths, feeders, basins, right of way,
locks, dams, water power, structures, stone excavated and
stone and materials quarried, purchased, produced or collected
for its construction; and all the property, right, title and
interest of the state, of, in and to said canal, with all the
hereditaments and appurtenances thereunto belonging, or in
any wise appertaining; and also all the remaining lands and
lots belonging to said canal fund, or which hereafter may be
given, granted, or donated by the general government to the
state, to aid in the construction of the said canal, and the
buildings and erections belonging to the state thereon situa-

ted; the said Board of Trustees to have, hold, possess and enjoy the same as fully and absolutely, in all respects, as the state now can or hereafter could do, for the uses, purposes and trusts hereinafter mentioned."

And that by section 20 of said act, the state solemnly pledged its faith to supply, by future legislation, all such defects as might be found necessary to enable the said trustees to carry into full effect the fair and obvious intent of the act.

And defendant avers that thereafter, and pursuant to said act, subscriptions were made to said loan in accordance with the said agreement to subscribe; that thereafter, and at its session in the year 1845, the legislature of the State of 236 Illinois passed an act entitled "An act supplemental to 'an act to provide for the completion of the Illinois & Michigan Canal, and for the payment of the canal debt,' approved February 21, 1843," approved March 1, 1845, section 1 of which provided that after the contract for the loan of \$1,600,000 as contemplated in the act entitled "An act to provide for the completion of the Illinois & Michigan Canal and for the payment of the canal debt" should have been duly executed in all respects as was provided by the terms of the above mentioned acts as modified by the provisions of this act, and trustees were appointed as contemplated in said act, the Governor of said state should execute and deliver unto the said trustees a deed of trust of all the property mentioned in the 10th section of said act of February 21, 1843, which said conveyance should include the lands and lots remaining unsold, donated by the United States to the State of Illinois to aid in the completion of the canal, to be held in trust as in the said act stipulated; and defendant avers that thereafter the Governor of the State of Illinois did execute and deliver a deed of trust as provided in said act.

And this defendant avers that by virtue of said act of the General Assembly of the State of Illinois passed February 21, 1843, and entitled "An act to provide for the completion of the Illinois & Michigan Canal and for the payment of the canal debt," and said deed of trust said Board of Trustees of the Illinois & Michigan Canal acquired all the right, title and interest of the state in and to the lands in section 25 hereinabove described, including the bed of the Desplaines River in said section and the lands between said alleged meander 237 lines in said section, for the purpose of securing the payment of the loan authorized by said act to be made for the purpose of completing said canal, and were authorized by said act to sell said lands at public auction in lots and legal

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subdivisions, said sales to be made for cash or on credit in the manner prescribed in the act of the 9th of January, 1836.

And this defendant avers that pursuant to such authority the said Board of Trustees did sell to the said Charles E. Boyer, the south fraction of the northwest quarter, and the north fraction of the southeast quarter, and the north fraction of the northwest quarter, and the south fraction of the southeast quarter, of section 25, in township 34, north of range 8, east of the 3rd P. M., excepting and reserving so much of said tract as is occupied by the canal and its waters, and a strip 90 feet wide on either side of said canal, containing 196.62 acres, more or less, and did execute and deliver to the said Boyer their deed dated the 22nd day of October, 1860, in words and figures substantially as follows, to-wit:

dated
22, 1860.

“Know All Men By These Presents, That the Board of Trustees of the Illinois and Michigan Canal, under the authority vested in said board by the act of the Legislature of the State of Illinois of February 21, 1843, entitled, ‘An act to provide for the completion of the Illinois and Michigan Canal and for the payment of the canal debt,’ has sold to Charles E. Boyer the following described tract of land, to-wit:

The south fraction of the northwest quarter and the north fraction of the southeast quarter, and the north fraction of the northwest quarter, and the south fraction of the southeast quarter of section twenty-five (25) in township thirty-four (34) north, of range eight (8) east of the third principal meridian, excepting and reserving so much of said tract as is occupied by the canal and its waters, and a strip ninety (90) feet wide on either side of said canal, containing one hundred ninety-six and sixty-two hundredths (196.62) acres, more or less, said tract being a portion of the land granted by the United States by the act of March 21, 1827, and the 29th of August, 1842, and the 3rd of August, 1854, to the State of Illinois, to aid said state in opening a canal to connect the waters of the Illinois River with those of Lake Michigan, and by said state granted to the said Board of Trustees of the Illinois and Michigan Canal, for the purposes set forth in said act of said state of February 21, 1843.

Know Ye Also, That the said Charles E. Boyer paid to the treasurer of said Board of Trustees the sum of one thousand five hundred and fifty-six dollars and fifty-two cents (\$1,556.52), being in full payment of the purchase money for said land, and made according to the conditions set forth in the act of January 9, 1836, entitled ‘An act for the construction of the Illinois and Michigan Canal.’ In consideration

thereof and the premises, the said Board of Trustees of the Illinois and Michigan Canal has granted, bargained and sold, and by these presents do grant, bargain and sell unto the said Charles E. Boyer, the said tract of land above designated and described.

To have and to hold the same, together with all right, privileges, immunities and appurtenances thereunto belonging unto the said Charles E. Boyer, his heirs and assigns, forever.

In Witness Whereof, the said Board of Trustees of the Illinois and Michigan Canal have caused the corporate seal of said board to be affixed hereunto and the names of the president and secretary of said board to be affixed hereunto this 22nd day of October in the year of our Lord, 1860.

W. H. SWIFT,

WILLIAM GOODING,

Secretary."

239 And defendant avers that the said Board of Trustees did by their said deed convey the lands therein described to the said Boyer and that this defendant, by mesne conveyances from the said Charles E. Boyer, and by virtue of the deed of conveyance from the said Board of Trustees of the Illinois & Michigan Canal to said Boyer, acquired all the right, title and interest of the said State of Illinois in and to the said northwest quarter and the southeast quarter of section 25, excepting so much of said tract as was occupied by the canal and its waters and said 90-foot strip.

And this defendant avers that its grantors and predecessors in title have used and cultivated the land lying between the alleged meander line and the waters of said Desplaines River in said southeast quarter of said section 25 down to the bank of said river, for more than 40 years last past, during all of which time they have been in open, notorious and peaceable possession thereof, claiming title thereto in fee simple.

And this defendant avers that the taxing authorities of the State of Illinois and the County of Grundy, in the State of Illinois, have from the date of the deed from the Canal Commissioners to said Charles E. Boyer, levied state, school and county taxes upon all of said land, including the land lying between the alleged meander lines and the waters of said Desplaines River and in the bed of the stream thereof, in said southeast quarter of said section 25, and have from time to time demanded and exacted of this defendant, and defendant's grantors and predecessors in title, the payment of such

Deed, dated
Oct. 22,

taxes, and this defendant and its predecessors in title 240 have ever since the date of the deed from said Board of Trustees to said Boyer, down to the present time, a period of forty-seven years, paid state, school and county taxes upon all of said land, including the land lying between the alleged meander lines and the waters of said Desplaines River, and in the bed of said stream, and the said State of Illinois and the people thereof are thereby estopped from claiming that the title to the lands lying between the alleged meander lines and the waters of said Deplaines River and in the bed of the stream thereof in said southeast quarter of said section 25 has not passed from the State of Illinois, or that it is not now vested in this defendant.

This defendant further answering, denies that the 90-foot strip of land along the Illinois & Michigan Canal is necessary for the proper maintenance and use of the canal, or that it constitutes a necessary integral part of said canal, and denies that the Board of Trustees and said Canal Commissioners of the State of Illinois had not the right and authority, under the law, to convey the same by deed, lease or otherwise; but, on the contrary thereof, this defendant avers that the 90-foot strip is not a part of the Illinois & Michigan Canal but is a part of the canal lands, and has been so held by the Supreme Court of this State, and that said strip has been to a large extent sold by the state, before the date of the said lease and contract of September 2, 1904.

Defendant avers that the land described in the deed from the Canal Commissioners to Harold F. Griswold, bearing date the 6th day of January, 1904, a purported copy of 241 which is attached to said bill as Exhibit J, to-wit, that part of section 31, township 34 north, range 9, east of the third principal meridian, in Will County, Illinois, lying southwest and southeast of the Illinois & Michigan Canal, and northeast and northwest of the Desplaines River (excepting a strip of land 90 feet in width on the southerly side of the Illinois & Michigan Canal and bordering thereon and continuous throughout said section 31) were canal lands and were not connected with water power upon the said canal or the 90-foot strip along the canal, and that the said Canal Commissioners had full power and authority to sell and convey the same.

This defendant avers that by mesne conveyances from the said Charles E. Boyer, it did acquire title in fee simple to the lands lying in the bed of said Desplaines River and outside of the alleged meander lines of said stream in the south-

east quarter of said section 25, and that by virtue of said contracts, Exhibits A and B, this defendant did acquire the right purported to be granted thereby, in and to the 90-foot strip of land lying between the waters of the Illinois & Michigan Canal and the said Desplaines River, and that the said deeds, leases, contracts and other agreements are valid and subsisting deeds, leases, contracts and agreements to the premises therein respectively described; and this defendant denies that by virtue of the several enactments of the Congress of the United States, and the several acts of the legislature of the State of Illinois, as set forth in said bill, the bed of the Desplaines River is owned by the State of Illinois, or that the same has not been conveyed by any deed to anybody
242 whomsoever; and denies that the lands on said section 25 last above described, and other sections of land along the line of the Desplaines River, so granted to the State of Illinois by the act of Congress hereinbefore referred to, outside of the alleged meander line of the Desplaines River, have not been conveyed by the State of Illinois nor by any other person or persons, or corporation whomsoever, having authority to so convey the same, and deny that the same remain, and are, owned by the State of Illinois; but, on the contrary thereof, this defendant avers that by virtue of the act and deed of cession of the State of Virginia, and the act of Congress of March 2, 1827, and the act of the legislature of the State of Illinois of February 21, 1843, the act of the legislature of the State of Illinois of March 1, 1845, and the deed of trust executed pursuant thereto, and the deed of the Board of Trustees of the Illinois & Michigan Canal, hereinabove referred to, and by mesne conveyances from the said Charles E. Boyer to this defendant, this defendant acquired all the said lands in the southeast quarter of section 25, township 34, range 8, east of the third principal meridian, in Grundy County, Illinois, excepting so much of said tract as is occupied by the canal and its waters, and a strip 90 feet wide on either side of said canal.

This defendant admits that it claims to be the owner of the bed of the stream of the Desplaines River and other lands of said southeast quarter of said section 25, and other lands for a distance of nine miles up the Desplaines River, which are outside of the alleged meander lines of said river, but denies that said claim is in violation of the rights and in
243 interest of the People of the State of Illinois, as alleged in said bill; and defendant avers that it has at great expense acquired lands in the bed of said Desplaines River, and

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along the shore thereof for a distance of about nine miles, including all the lands which will be flooded by its proposed dam, for the purpose of creating water power as alleged in said bill; admits that it had actually begun the erection of a dam across the said Desplaines River and across the 90-foot strip of land alleged by said bill to be reserved for the use of the Illinois & Michigan Canal, and across other lands outside of the alleged meander lines of the Desplaines River to connect with the bank or towpath of the canal, and was so constructing said dam as to cause the water to be backed up and to overflow the lands along said river for the distance of 9 miles or thereabouts, but denies that any of the lands so to be overflowed belong to the State of Illinois.

This defendant admits that on the 12th day of December, 1907, the attorney general of the State of Illinois caused to be served upon it a certain notice as is alleged in paragraph 9 of said bill, copy of which is attached to said bill, marked "Exhibit M;" and admits that it disregarded said notice as it had a right to do; and admits that after the service of said notice, it continued in the work of constructing said dam at said place in the bed of said river, as alleged in said bill; and admits that it continued such construction up until the issuance of the temporary injunction herein; but denies that the completion of said dam would be to the great impairment, or any

impairment, of the easement of navigation, if any such
244 easement existed, or to the great and irreparable injury, or to any injury, of the people of the State of Illinois, but avers that in case the United States or the State of Illinois should hereafter construct a deep waterway in said Desplaines River said dam will be a distinct aid and benefit thereto, to the extent of more than \$500,000.

Denies that if said dam is permitted to be erected by said defendant, it will destroy and interfere with the Desplaines River of Illinois, or for the people of the United States, and avers that its said dam does not and will not in anywise interfere with the intent and purpose of said act of the Legislature of Illinois of December 6, 1907.

Denies that it will overflow or destroy the value of lands, and the use of lands, belonging to the state, adjacent to the Desplaines River, or that it will destroy the use of the 90-foot strip of land, or that it will render the same inoperative, and a purpresture, or that it will impair the benefit of the same to said canal; denies that it will destroy a feeder of the Illinois & Michigan Canal, or that it will constitute a purprest-

ture or that the same will produce and work irreparable loss and damage, or any loss and damage to, the Illinois & Michigan Canal, or to the State of Illinois, or to the rights of the people of the State of Illinois.

This defendant further answering, admits that the agreement, Exhibit A, purports to give rights as therein set forth; but denies that each and every, or any, of the provisions of such agreement relating to such rights were beyond the 245 power of the said Canal Commissioners to grant; but avers that at the date of said several agreements, the said Canal Commissioners, had full power and authority to grant the rights and privileges granted in and by each and every of said contracts.

This defendant admits that the lease, Exhibit B, purported to convey and demise an interest in the said 90-foot strip within the area described in said lease, in that part of the canal called the Kankakee Feeder, and purported to give a right of removal to the party of the second part therein named, and purported to be made subject to said contract Exhibit A.

Admits that each of said contracts purported to be contracts on the part of the Canal Commissioners with said Griswold, his successors and assigns, but denies that by their terms they might be assigned one to one assignee and the other to another or different assignee.

This defendant admits that the said contract was so entered into between the parties thereto, with the mutual knowledge and understanding that the party of the second part, or his assignee, intended to make use of the same in erecting said dam and developing water power in the Desplaines River, but denies that the same amount to a lease of water power rights on, or of lots and lands connected with water power on the Illinois and Michigan Canal.

Admits that said lease and contract were not entered into upon notice by publication, and that they were not limited to a period of ten years, but denies that that fact was contrary to the provisions of a certain act entitled "An act

246 to revise the law in relation to the Illinois & Michigan Canal and for the improvement of the Illinois and Little Wabash Rivers," approved March 27, 1874, and acts amendatory thereof, and in particular to the provisions of clause 6 of section 8 of said statute as amended by a certain act amendatory thereof, approved June 19, 1891, in force July 1,

1891, and deny that the said lease and contract were beyond the power of the commissioners to enter into, or that the same are null and void.

This defendant denies that treating said instruments as leases of water power, they are subject to the power of the state to resume, without compensation to this defendant, the use of such water power, or that they are further subject to the power of the state to abandon or destroy the work by the construction of which the water privilege therein purported to be conferred shall have been created whenever, in the opinion of the legislature, such work shall cease to be advantageous to the state.

This defendant denies that clause 6 of section 8 of the act approved March 27, 1874, as amended by act approved June 19, 1891, applies to the premises so leased by said instrument, and avers that said act only authorizes the abandonment or destruction of works over which the state or the canal commissioners have control.

This defendant denies that the opinion of the legislature that such work has ceased to be advantageous to the state, was expressed by the statute approved and in force December 6, 1907, entitled "An act recognizing the Desplaines and Illinois Rivers as navigable streams, and to prevent obstructions being placed therein, and to remove obstructions therein now existing."

This defendant avers that said act last mentioned has no reference to any work connected with said canal, over which the said Canal Commissioners or the legislature of the State of Illinois had any authority or control.

This defendant denies that said contract was a further lease for the purpose of enabling the assignee therein to develop and create water power, but avers the same was merely a flowage contract and not necessary to be made in conformity with the provisions of the statute last above cited in reference to the Illinois & Michigan Canal.

Denies that the Kankakee Feeder was an integral part of said canal or that said agreement was beyond the power of the Canal Commissioners to make; but, on the contrary thereof, said feeder has long since been abandoned, and was wholly unnecessary for the operation of said canal.

This defendant admits that said lease, Exhibit C, contained a provision expressly reserving to the Commissioners the right to cancel the lease and to recover possession of the land,

property and rights therein demised and referred to, whenever in the judgment of the Canal Commissioners or other proper officers of the state at such time having charge of the canal property, they shall deem the interest of the state required it to re-possess and use said property for state purposes; but this defendant denies that said power of revocation and cancellation may be exercised by the legislature of 248 the state, and denies that the same was exercised by the legislature of the state by the enactment of the statute of December 6, 1904, above referred to; and denies that the exercise of the powers, privileges and rights conferred by said lease Exhibit C will constitute and create obstructions of the Desplaines River.

This defendant admits that Exhibit J purports to convey the lands therein described, and in terms includes the lands lying and being situated outside of the alleged meander lines of the Desplaines River, and that it purports to be subject to the terms of said flowage contract, Exhibit A, and said lease, Exhibit B.

This defendant denies that the lands and lots described in said deeds are lands and lots connected with the water power privileges.

Denies that Exhibits A and B purport to convey and create water power privileges.

Admits that said advertisement thereof did not designate and describe said premises as water power privileges, and did not limit the same to the term of ten years, but denies that leases of water power privileges were at the time of the execution of said lease limited by law to a term of ten years, but avers that by the sixth clause of section 8 of the act of March 27, 1874, entitled "An act to revise the law in relation to the Illinois & Michigan Canal and for the improvement of the Illinois and Little Wabash Rivers," as amended by act approved April 21, 1899, in force July 1, 1899, the Commissioners were given power to lease water power and lands and 249 lots connected therewith for a period of twenty years, and power to provide for the extension of any lease from time to time.

And this defendant denies that said contract and lease, Exhibits A and B, were beyond the power of said commissioners, or were null and void, and denies that the same were leases of water power or lands and lots connected therewith within the meaning of any of said acts, or that they were

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I. subject to any power in the state to resume the same, or to abandon and destroy the work by the construction of which water power shall have been created, whenever in the opinion of the legislature such work should have ceased to be advantageous to the state.

And this defendant denies that the opinion of the legislature that the work ceased to be advantageous to the state was expressed by the statute, approved and in force December 6, 1907, entitled an act recognizing the Desplaines and Illinois Rivers as navigable streams and to prevent obstructions being placed therein, and to remove obstructions therein now existing.

This defendant admits that the pole lease, Exhibit K, conveyed to said Griswold, his successors and assigns, the right to maintain a line of poles along said canal from the west line of said section 25, upon which said dam has been located, to Robey street, in the City of Joliet, and from the same point in said section 25 to the west limits of the City of Morris, in Grundy County; and this defendant admits that the said lease was made upon the same day as said contract and lease, Ex-

hibit A and Exhibit B, and admits that it was for the 250 purpose of transferring and conveying electrical energy by said proposed line of poles, but denies that it was subject to all the infirmities alleged in said bill as to said contract and lease, Exhibits A and B, or to any infirmity.

This defendant denies that said contract, deeds and leases, or either, or any of them, were entered into on an inadequate consideration; but, on the contrary thereof, avers that the consideration paid therefor by said Harold F. Griswold to said Canal Commissioners was wholly adequate and was the full value of the rights thereby granted.

Defendant avers that the granting of the temporary injunction herein without bond has resulted in irreparable injury to this defendant, and was a taking of the property of this defendant without due process of law in violation of the 14th Amendment to the Constitution of the United States, and section 2 of Article III of the Constitution of Illinois.

This defendant denies that the said complainant, the State of Illinois, or the people thereof, are entitled to the relief prayed for in said bill, or any part thereof, and prays the same advantage of this answer as if it had pleaded or demurred to said bill of complaint, and it prays that the temporary injunction heretofore issued herein be dissolved, and

that defendant be hence dismissed, with its reasonable costs and charges in this behalf most wrongfully sustained. Defendant's Exhibit

ECONOMY LIGHT & POWER COMPANY,
By SCOTT, BANCROFT & STEPHENS.

ISHAM, LINCOLN & BEALE,
SCOTT, BANCROFT & STEPHENS,
Solicitors for said Defendant.

251 (Endorsed) Filed this 30th day of March, 1908 Fred
S. Johnson, Clerk.

State of Illinois, }
Grundy County. } ss.

Certified
clerk
Grundy
County
Circuit

I, Fred S. Johnson, Clerk of the Circuit Court of Grundy County, in the State aforesaid, and keeper of the records and filed of said Court, do hereby certify the above and foregoing to be a true, perfect and complete copy of a certain answer, filed March 30th, 1908, in a certain cause lately pending in said Court, on the Chancery side thereof, wherein The People ex rel. Charles S. Deneen & William H. Stead Atty. Genl. were complainants & The Economy Light & Power Co., was defendant, as the same appears from the records and files of said Court now in my office remaining.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Morris, this 10th day of December, A. D. 1913.

FRED S. JOHNSON,
Clerk.

(Seal)

CIRCUIT COURT OF GRUNDY COUNTY,

Chancery.

March Term, 1908.

The People ex rel. Charles S. Deneen
and William H. Stead, Atty. Gen. } No. 1526.
vs.
The Economy Light & Power Co. }

This cause having come on to be heard on final hearing upon the pleadings and upon the depositions taken and filed herein and upon the evidence taken and heard on behalf of the parties respectively in open court and the court being fully advised and having heard argument of counsel, it is ordered, adjudged and decreed that the information or Bill of complaint herein be and it is hereby dismissed for want of equity without prejudice however to the right of the State of Illinois to hereafter claim in any future proceeding that the provisions of the lease (in said information mentioned and made Exhibit B thereof) made by the Canal Commissioners of Illinois to Harold F. Griswold under date of September second 1904 relating to the making of a renewal at the expiration of the term of said lease are void and of no effect.

Complainant excepts to the finding and decree of the court.

Whereupon the complainants pray an appeal to the Supreme Court of Illinois which is hereby allowed and time is granted and leave is given to complainants to file a certificate of evidence by September 15th, 1908 and said appeal is allowed without bond.

June 27, 1908.

Entr.

JULIAN W. MACK,
Judge.

253 State of Illinois, }
 Grundy County. } ss.

Certific
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 Court
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I, Fred S. Johnson, Clerk of the Circuit Court of Grundy County, in the State aforesaid, and keeper of the records and files of said Court, do hereby certify the above and foregoing to be a true, perfect and complete copy of a decree entered June 27th, 1908, and recorded in Chancery Record I on page 62 thereof, in a certain cause pending in said Court, on the Chancery side thereof, wherein The People ex rel. Charles S. Deneen & William H. Stead, Atty. Gen. were complainants & The Economy Light & Power Co., was defendant, as the same appears from the records and files of said Court now in my office remaining.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court at Morris, this 10th day of December, A. D. 1913.

FRED S. JOHNSON,
Clerk.

(Seal)

(Here follows a Certified copy of the Opinion filed in the Supreme Court for the State of Illinois, on the 26th day of October, 1909, in the cause entitled People ex rel. C. S. Deneen, Appellant v. Economy Light & Power Co. The same Opinion is set out in Abstract of Proofs in Vol. III on pages 3127 and not copied here.)

254 Northern District of Illinois, }
 Eastern Division. } ss.

Certific
 clerk

I, T. C. MacMillan, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing contained in Volumes, marked Abstract of Proofs, Vol. I, Vol. II, Vol. III and Volume IV of Proofs, to be true and complete copies of the same, made in accordance with Praecept, filed in this Court, in the cause entitled, United States of America, vs. Economy Light & Power Company, as the same appear from the originals thereof, now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court, at my office, in the City of Chicago, in said District, this sixth day of August, 1917.

T. C. MACMILLAN,
Clerk.

(Seal)

255 United States } ss.
 of America. }

The President of the United States to the United States of America and Charles F. Clyne, U. S. Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at the City of Chicago, in the State of Illinois, within Thirty days from the date hereof, pursuant to an order allowing an appeal entered in the Clerk's office of the District Court of the United States for the Eastern Division, Northern District of Illinois, in that certain action, No. 29,776, in which the United States of America is the complainant and appellee, and the Economy Light and Power Co. is defendant and appellant, to show cause, if any there be, why the decree rendered against the said defendant and appellant, as in the said order allowing the appeal mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Kenesaw M. Landis, Judge of the United States District Court in and for the Eastern Division of the Northern District of Illinois, this 14th day of July, A. D. 1917.

KENESAW M. LANDIS,
District Judge.

Service of the within citation, and receipt of a copy thereof, admitted this 20th day of July, A. D. 1917.

CHARLES F. CLYNE,
U. S. Attorney.

256 Endorsed: Filed July 20 1917 at _____ o'clock _____ M.
 T. C. MacMillan, Clerk.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS

Stipula

For the Seventh District.

Economy Light and Power Company, a corporation,	}	<i>Appellant.</i>
vs.		
United States of America,		<i>Appellee.</i>

STIPULATION.

It Is Hereby Stipulated between the parties, hereto, by their respective counsel, that the continuance of the narrative of John Tanner, which appears upon pages 1073 to 1078, both inclusive, of the record of proceedings upon the trial of the above entitled cause in the United States District Court for the Eastern Division of the Northern District of Illinois, and which was inadvertently omitted from the "matters introduced upon the hearing, and not appearing in the printed record" filed in said District Court pursuant to order of said court entered July 3, 1917, and copy of which is hereto attached numbered pages 11, 12, 13, 14 and 15, both inclusive, may be filed in the Circuit Court of Appeals as a part of the record on appeal in that court, and may be printed and inserted in the transcript of record in said cause immediately following the first portion of the narrative of said John Tanner ending upon page 2455 of said transcript of record.

FRANK H. SCOTT,

Attorney for Appellant.

CHARLES F. CLYDE,

CLARENCE N. GOODWIN,

Attorneys for Appellee.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing printed pages, numbered from 1 to 3351, inclusive, contain a true copy of the printed record consisting of four (4) volumes, filed November 15, 1917, on which this cause was heard, argued and determined in the case of Economy Light and Power Company vs. United States of America, No. 2525, October Term, 1916, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of May A. D. 1919.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit
Court of Appeals for the Seventh Circuit.*

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Courtroom in the City of Chicago, in said Seventh Circuit, on the third day of October, 1916, of the October term in the year of our Lord one thousand nine hundred and sixteen and of our Independence the one hundred and forty-first.

And afterwards, to-wit: On the fourteenth day of August, 1917, in the October term last aforesaid, came the appellant, by its counsel, Mr. Frank H. Scott, and filed in the office of the Clerk of this Court his appearance, which appearance is in the words and figures following, to-wit:

United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1916.

No. 2525.

ECONOMY LIGHT AND POWER Co., Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

The Clerk will enter my appearance as counsel for the appellant.
FRANK H. SCOTT.

Endorsed: Filed Aug. 14, 1917. Edward M. Holloway, Clerk.

At a Regular Term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Courtroom in the City of Chicago, in said Seventh Circuit, on the second day of October, 1917, of the October term, in the year of our Lord one thousand nine hundred and seventeen and of our Independence the one hundred and forty-second.

And afterwards, to-wit: On the eighth day of February, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

FRIDAY, February 8, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. Christian C. Kohlsaat, Circuit Judge.

Hon. Samuel Alschuler, Circuit Judge.

Hon. Evan A. Evans, Circuit Judge.

Edward M. Holloway, Clerk.

Before Hon. Francis E. Baker, Circuit Judge.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon the filing of a stipulation of counsel, It is now here ordered that the continuation of the narrative of John Tanner attached to said stipulation be, and the same is hereby made a part of the record in this cause in this Court.

And afterwards, to-wit: On the sixth day of May, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

MONDAY, May 6, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. Christian C. Kohlsaat, Circuit Judge.

Edward M. Holloway, Clerk.

Before Hon. Christian C. Kohlsaat, Circuit Judge.

2525.

ECONOMY LIGHT AND POWER COMPANY

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered that the time for appellee to file its brief be, and the same is hereby extended to August 1, 1918.

And it is further ordered that this cause be, and the same is hereby

set down for hearing on Wednesday, October 2, 1918, by agreement of counsel.

And afterwards, to-wit: On the fifth day of July, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

FRIDAY, July 5, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.

Before Hon. Samuel Alschuler, Circuit Judge.

2525.

ECONOMY LIGHT AND POWER COMPANY

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

On application of counsel for appellee, it is ordered that the appellee may withdraw from the files of this Court in this cause the original books of maps, etc., same to be returned within 30 days from this date.

And afterwards, to-wit: on the seventeenth day of September, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, September 17, 1918.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.

2525.

ECONOMY LIGHT AND POWER COMPANY

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

It is ordered that the order of May 6, 1918 in this cause be, and
the same is hereby vacated.

At a Regular Term of the United States Circuit Court of Appeals for
the Seventh Circuit, begun and held in the United States Court-
room in the City of Chicago, in said Seventh Circuit, on the first
day of October, 1918, of the October term, in the year of our Lord
one thousand nine hundred and eighteen and of our Independence
the one hundred and forty-third.

And afterwards, to-wit: On the first day of October, 1918, in the
October term last aforesaid, the following further proceedings were
had and entered of record, to-wit:

TUESDAY, October 1, 1918.

Court opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. Julian W. Mack, Circuit Judge.

Hon. Evan A. Evans, Circuit Judge.

Edward M. Holloway, Clerk.

John J. Bradley, Marshal.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby
set down for hearing on October 29, 1918.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon application of counsel for appellant, It is ordered by the Court that counsel for appellant may file a reply brief on or before October 25, 1918.

And afterwards, to-wit: On the seventeenth day of October, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, October 17, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier:

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. Julian W. Mack, Circuit Judge.

Hon. Samuel Alschuler, Circuit Judge.

Edw. M. Holloway, Clerk.

John J. Bradley, Marshal.

2525.

ECONOMY LIGHT AND POWER COMPANY

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

It is ordered by the Court that this cause be, and the same is hereby re-set down for hearing on November 6, 1918, and that appellant file a reply brief by November 1, 1918.

And afterwards, to-wit: On the sixth day of November, 1918, in the October term last aforesaid, there was filed in the office of the

Clerk of this Court a certain Motion, which said Motion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit,
October Term, A. D. 1917.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY, Appellant,

VS.

UNITED STATES OF AMERICA, Appellee.

Motion of Appellee for Leave to File Printed Answer to Reply of Appellant.

Now comes the appellee by its counsel and moves the Court for leave to file a printed answer to "Reply Brief for Appellant and Analysis of Appellee's 'Synopsis of the Evidence,'" within such time as may be agreeable to the Court, and in the alternative for leave to file an answer to so much of said document as constitutes an "Analysis of Appellee's Synopsis of the Evidence," and for ground of such motion shows: 1. That appellant in its prief presents no statement, analysis, review, or synopsis of the evidence in this cause, and the burden of preparing such a review therefore fell upon appellee. The appellant devotes a large portion of its reply to criticism of appellee's review of the evidence.

Appellant's reply came into the hands of the appellee's counsel on the morning of November 3rd, and as the argument is set for November 6th at 10 o'clock, sufficient time does not intervene to permit appellee's counsel to file a printed answer.

2. In the ordinary course a review of the evidence should have been presented by appellant. This would have given appellee an opportunity to criticise and supplement it and appellant an opportunity to reply to any criticism.

3. By failing to follow this course appellant under the rules prevents appellee from replying to appellant's criticism of its review of the evidence.

Respectfully submitted,

CHARLES F. CLYNE,

United States Attorney;

CLARENCE N. GOODWIN,

Special Assistant to the United States Attorney General,

Counsel for Appellee.

Received a copy of the foregoing motion this 6th day of November,
A. D. 1918, before the hour of 10 o'clock.

FRANK H. SCOTT,

Counsel for Appellant.

Endorsed: Filed Nov. 6, 1918. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the sixth day of November, 1918, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, November 6, 1918.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. Evan A. Evans, Circuit Judge.

Hon. Arthur L. Sanborn, District Judge.

Edward M. Holloway, Clerk.

John J. Bradley, Marshal.

2525.

ECONOMY LIGHT AND POWER COMPANY

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon motion of counsel for appellee Clarence N. Goodwin, it is ordered by the Court that the appellee may file a reply brief in this cause within ten days from this date.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. Frank H. Scott, counsel for appellant, and by Mr. Clarence N. Goodwin, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to-wit: On the twenty-first day of January, 1919, in the October term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court, which said Opinion is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit,
October Term and Session, 1917.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY, Appellant,

VS.

THE UNITED STATES, Appellee.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

Before Baker and Evans, Circuit Judges, and Sanborn, District
Judge.

December 14, 1909, the United States filed its bill of complaint against the Economy Light and Power Company alleging that said company had without the consent of Congress and without authority of the legislature of Illinois commenced the construction of a dam in the Desplaines River at a point in Grundy County, Illinois, and that the portion of the Desplaines River in which the construction of the dam had been commenced was navigable water of the United States, and praying the court to order, adjudge and decree said Desplaines River to be a navigable river and one of the navigable waters of the United States; that the portion of the dam constructed be held to be in violation of the provisions of section 9 of the Act of March 3, 1899, and ordering its removal, and that the defendants and its officers and agents and all persons acting under them be enjoined perpetually from placing any further obstruction in said river, and from doing any other act or performing any other work in connection with the construction of said dam.

On February 28, 1910, the defendant filed its answer, admitting the commencement of the construction of a dam as alleged, but denying the navigability of the portion of the Desplaines River in which said dam was being constructed. A very large amount of evidence was taken, the abstract containing 3186 printed pages.

From a decree entered May 25, 1917, perpetually enjoining the defendant, its officers, agents, &c., as prayed, defendant appeals.

Opinion by Sanborn, District Judge.

The Desplaines up to 1894. The Chicago-Desplaines-Illinois water route, used from 1673 to 1825 by explorers and in the fur trade, was made up of portions of the Chicago and Desplaines rivers, now some eight miles apart. It includes the Chicago River from its mouth on Lake Michigan to Robey street, Chicago, on the west fork of the south branch, thence westerly, by water or portage, to Mud Lake, about two miles, thence to the Desplaines near Riverside, two miles, down the river to the Illinois, made by the confluence of the Desplaines and Kankakee. The part of this route between the Chicago and Desplaines is called the Chicago divide. The Desplaines River

risers near the county line between Racine and Kenosha counties, Wisconsin, and runs in a southerly direction, parallel substantially to the west shore of Lake Michigan, through Lake and Cook counties, Illinois, until it reaches Riverside, some 11 miles from the mouth of the Chicago River; thence it takes a southerly direction through Cook and Will counties to its confluence with the Kankakee River near the east line of Grundy County. The original area of the Desplaines River basin was 1428 square miles, and with the changes which have been made the present area is taken at 1392 square miles. The Desplaines River basin is usually divided into the Upper Desplaines and the Lower Desplaines, the term Upper Desplaines applying to that portion above Riverside. The Upper Desplaines basin has an area of 633 square miles, a general length of about 60 miles, and a general width of about 10 miles, and is a true basin; has practically no true tributary basins, except Salt Creek which has about 110 miles, entering at Riverside. It is a rolling country, originally covered with one-half to one-third in timber. Its general declivity by its flood plane is about one and a half feet per mile. The river bed is cut as a groove in a prairie, rather than the ordinary river bed, with an overflow or flood plane on either side. Originally it had a considerable quantity of swamp, marsh and bog at head waters; and in Lake County and in portions of Cook County and also upon Salt Creek in Du Page County; and a lake development in Lake County from which that county derives its name.

The characteristics of the Lower Desplaines basin, that portion below Lyons or Riverside, are that it covers by the general course of the valley about 42 miles to the confluence with the Kankakee, and has a total descent of about 102 or 103 feet. It has a true sub-basin in the Du Page River which covers 366 square miles. The total area is 795 square miles below Riverside, but outside of the Du Page River this area is only 429 miles. The valley in itself is not a characteristic valley like the Upper Desplaines, but has the appearance of being an old water course or outlet from the great lakes in which the modern stream follows through remnants of an ancient stream of much greater magnitude, a succession of pools and wide expanses with intermediate channels, which have not yet developed to their proper proportions, connecting these pools and water stretches. The river valley or river has two considerable tributaries aside from the Du Page, in Hickory Creek and Jackson Creek, but otherwise the drainage is essentially marginal or shore drainage.

Beginning within a mile of the township line between Riverside and Lyons is a long level expanse known as the twelve mile level, consisting of a succession of water expanses and connecting straits or channels from 150 feet up to a quarter or an eighth of a mile in width, in places, and with varying depths up to 10 or 15 feet in localities; these water expanses having a mud bottom which seem to be more vegetable deposits than alluvial, and which indicate originally much greater depth; and margined in by a vegetable growth. These expanses were for a long time used as ice fields by the ice interests which had their market in Chicago. Below the twelve mile level is a succession of ponds and shallow connections in the rock, like Goose Lake and Round Lake, and others between Romeo and the twelve mile level. This whole stretch is well described in the

original land survey as a succession of swamps, pods, lakes and marshes connected by currents.

Below Romeo, which is 6 miles below Lyons, there is a declivity at the rate of 7 feet per mile from the Romeo highway down to the head of Lake Joliet, a distance of 11 miles, pretty uniformly distributed. Thence for a distance of about 13 miles between that and the mouth of the river there are some 10 miles occupied by pools, or Lake Joliet, which has a length of nearly 6 miles and has a width of 500 to 900 feet, and a depth originally up to 15 or 20 feet; and then a pool of over a mile in length immediately below Treat's Island rapids; then Lake Du Page, some 13 miles in length, with a width of about 350 feet on the average, and with a depth of 10 feet and upwards, these pools being connected by intermediate rapids like the one at Treat's Island and the one near the mouth of the Kankakee, and the reach of swifter and shallower water between the pool below Treat's Island and the head of Lake Du Page. These distances are given only approximately, and to show some *some* of the characteristics of the stream. This description applies to the Desplaines River as it was known up to about 1894, when the Sanitary District works changed the conditions very radically through the valley above the city of Joliet, between there and Lyons or Riverside. The proportion of the Desplaines River itself from the end of the portage road to its mouth, or confluence with the Kankakee, that would consist of pools, would be about 60 per cent. The total distance from the portage road to the confluence with the Kankakee is about 44.5 miles. In that distance there would be the so-called 12 mile level, which is 13.7 miles, Lake Joliet, the pool below Treat's Island, and Lake Du Page, aggregating 10 miles, and Goose Lake and Round Lake, and some other stretches unnamed, amounting in all to about 27 or 28 miles out of a total of 44.5. The distance from dam No. 1 to the mouth of the river is 15.72 miles, of which about 10 miles consists of pools. This stretch is now more particularly in question. The condition of these pools if the Desplaines River were to run dry, that is, no water pass from pool to pool, would be that Lake Joliet would be practically available for boats as before, the depth in it being from 20 to 25 feet at the maximum, and a large proportion of it having more than 10 feet.

The distance from Lake Michigan to the mouth of the Desplaines River is 58.32 miles, made up as follows:

From Lake Michigan to Ashland Avenue, which is substantially at the forks of the south branch of the Chicago River	5.5 miles
Ashland Avenue to Ogden dam, which is across the old portage slough, on the range line, R. 12, 13, north of Summit.....	8.3
The so-called 12 mile level, actual length.....	13.7
From 12 mile level to Isle la Cache.....	6.7
Isle la Cache to dam No. 1.....	8.4
Dam No. 1 to head of Lake Joliet.....	3.
Head of Lake Joliet to the mouth of Desplaines River	12.72
	<hr/>
	58.32

A gauge record kept at Riverside for a period of 20 years from the year 1886 to 1904, both inclusive, showed the water stood at above 18 feet on the Riverside gauge an average of 4.3 days per year; at or above 13.8 feet an average of 47.6 days per year; at or above 13 feet an average of 73.2 days per year; at an elevation of 12.4 feet an average of 116.2 days per year; at or above 11.85 feet an average of 190.65 days per year.

When the water stood at 10.5 at the head of the 12 mile level at Summit, corresponding to 13 feet on the Riverside gauge, and a volume of 600 second feet, the water in the portage swamp and channels connecting with the Desplaines River would be flowing over to the Chicago River to the extent of the capacity of the trench that existed below this level. During the 20 year period referred to water would have flowed over the Chicago divide on an average of 73.2 days per year.

At all elevations when the water at Summit stood at 11.73 or above, corresponding to an elevation of 13.8 on the Riverside gauge, and to a volume of 1052 second feet, a boat drawing 15 inches of water could pass from the Desplaines River across the Mud Lake region and over the continental divide and into the Chicago River without making any portage between them. Such condition would have prevailed during the 20 year period an average of 47.6 days per year.

At an elevation between 13.8 feet and 13 feet the water would gradually diminish in depth on the Chicago divide, and when a portage became first necessary it would be about one mile in length, and when it reached the level of 10.5 it would be two miles in length between the west fork at Western Avenue, Chicago, and the beginning of deep water in Mud Lake.

At an elevation between 13 feet and 12.4 feet on the Riverside gauge boats could no longer pass between Mud Lake and the Desplaines River except light, and be entirely stopped, and a portage of one or two miles would be required between Mud Lake and the Desplaines River, in addition to the portage of two miles between the west fork and Mud Lake. In this condition there would be a substantial navigable depth of 15 inches between Isle la Cache and Mount Juliet, a distance of 11 miles. Isle la Cache is located in the Desplaines River on the township line between the towns of Du Page and Lockport.

At an elevation between 12.4 feet and 11.85 feet on the Riverside gauge the Chicago divide would require the two portages mentioned, or the alternative of a 7 mile portage between the waters of the Chicago River and the Desplaines. The Desplaines would have a navigable depth of 12 to 15 inches, with possibly some deficiency in one or two localities; from Romeo down to the head of Lake Joliet there would be sufficient water for a boat at the higher stages to go down partially loaded, and at the lower stages to go down light, but at the lower stages the cargo itself would require a transfer over the 11 miles from Isle la Cache to Mount Juliet. All the river below Lake Joliet would be navigated by discharging the cargo in part or wholly at Treat's Island, and near the mouth of the river.

There has been no time when the Desplaines River ran absolutely dry and there was not any water passing from pool to pool except as it was artificially produced by the abstraction of water from the Desplaines either for canal purposes during the time in which the Desplaines was used in that connection as a feeder, or through the cutting down of the Chicago divide and the draining of the water towards Chicago at medium and low stages.

Changes in Desplaines River. Various changes have been made in the Desplaines River from its condition as it existed in a state of nature. The portage swamp region lying east of the range line at Summit has been drained and made tributary to the Chicago River, except so much as is tributary to the canal, this area amounting to 48 square miles. There has been added from the Sag region an area of about 12 square miles, making the change below Lemont 36 square miles to be deducted from the former areas. The deficiency of rainfall averaging 2.9 inches per year during the period of 20 years from 1887 to 1910, computed from the Riverside gauge, would produce a deficiency in run-off of probably 15 or 20 per cent., and the effect of that would be to diminish both the volume and duration for the stages of water exhibited in the table referred to. There is also a deficiency in the run-off due to the substantial clearing away of the forest-covered area of 5 per cent. There are changes which have affected the distribution of the run-off. The clearing away of the forests has destroyed an element of control which has diminished the control and the duration of the stages of water; and in addition the restriction of ponds and lakes and the drainage of wet lands, bogs and marshes, and particularly the destruction of a special control existing in the portage swamp region and 12 mile level, all of which under natural conditions prolong the stages of water.

There have been radical changes in reference to the depletion of the water in the Desplaines River from a state of nature. The first change of significance was due to the construction of the Illinois and Michigan Canal in 1848. The effect of the construction of that canal upon the water in the lower Desplaines was a reduction of the drainage of the river below the dams at Joliet to less than 250 square miles out of a total of 1428 square miles. Further interference arose from the fact that the location of the canal along the south and east side of the valley caused the hill drainage to be turned in part toward Chicago, and on the tangent between Summit and Bridgeport (in the southwestern part of Chicago) it ran across the south arm of Mud Lake, cutting off the drainage and reservoir control of that portion of the portage swamp region lying to the south of the canal. From 1866 to 1871 the Illinois and Michigan Canal was deepened, causing interference with the flow of the river. Further interference was caused by the construction of ditches in the Mud Lake region, and by the erection of pumping works at Bridgeport in 1883. Interference also occurred by reason of the construction of the river diversion by the Sanitary District in 1893-4, by which the Desplaines River was shifted to the west and north side of the valley so as to leave a site between the river as thus changed and the Illinois and Michigan Canal for the construction of the drainage canal itself. Interference has also been caused by inhabitation which has cut away forests, thus

curtailing the run-off, and there has been drainage of swamps and wet lands, and the destruction of ponds and lakes. The Sanitary and Ship Canal, which was completed in 1892, joins the Desplaines at Dam No. 1, 31.6 miles from Riverside, from which point its waters flow into and increase the current of the Desplaines.

These various changes have materially interfered with the flow of the river, and the conditions in the basin itself have been changed by the actual disposition of the flow. The Desplaines River has an impermeable soil bottom, and the control that was exercised was surface control largely. The destruction of this surface control has affected the flow of the water much more radically than would have been the case had the ground been permeable.

Use of Desplaines River. From the latter part of the seventeenth century through the first third of the nineteenth century men engaged in the fur trade passed up and down the Chicago and Desplaines rivers in canoes and flat boats very regularly. Fourteen specific instances of the use of the Desplaines down to the year 1830 are shown in the evidence, as follows: Trips to Chicago: Joliet and Marquette, 1673; Perrault, 1783; Joutel, 1688; Hubbard, 1819; Ebenezer Child, 1821; Tonty, 1680; La Salle, 1681; Fonda, 1825. Trips from Chicago: Father Membre, 1682; St. Cosme, 1698; Hubbard, 1818; Marquette, 1674; Howard, 1790; Furman, 1830. Very many other trips made during the same period, not so well authenticated, are disclosed in the evidence, and numerous historical references to the Chicago-Illinois route. No doubt other instances of its use may properly be inferred. It was employed by the American Fur Company down to 1825, and then abandoned for other routes. The trial judge found as the record shows, that there is no evidence of actual navigation within the memory of living men, and therefore there would be no present interference with navigation by the building of the proposed dam. But it was held that the evidence shows the Desplaines a navigable water of the United States, preserved as such by the legislation of Congress.

In the early days the fur trade was a leading branch of commerce in the western world, and this trade was one of the characteristics of the Desplaines River. Large quantities of supplies of various kinds needed by the settlers in a new country were also transported over the Desplaines during the same period in boats of the size and character then commonly used in river commerce, this transportation being carried on between Chicago, St. Louis and other points. Canoes of several tons burden were used; some were 35 feet long by 6 feet wide, some 33 feet long by 4½ feet wide, worked by paddles and occasionally a sail, and had a crew of eight men, carrying as much as 6,000 pounds of freight as well as 1,000 pounds of provisions. The pirogues were manned by six or seven oars; the bateaux were larger than the pirogues; the Durham boats were heavy freight craft, 60 feet long, 8 feet wide, 2 feet deep, with a capacity of 15 tons, drawing 20 inches of water.

Commerce of this character existed until about the year 1825. After that year the fur trade having receded to interior portions of Illinois was reached more generally by horses. After the year 1848, when the Illinois and Michigan Canal was constructed, commerce

that had formerly been carried on the Desplaines River was carried on the canal. Radical changes had taken place in the condition of the river as heretofore shown, which resulted in a diminution of the flow in the river, and this was one of the causes for the non-use of the river.

Up to 1889 several dams had been built across the Desplaines River, to wit: Daggett's Mill, one half mile below Lockport; dam No. 1, 10 feet high, belonging to the state, Joliet; dam No. 2, 8 feet high, one-half mile below dam No. 1, also belonging to the state; Adams dam, 6 feet high, and less than a half mile below dam No. 2. Formerly a dam existed at the foot of Lake Joliet at Treat's Island, and also one at the foot of Lake Du Page. These have long been abandoned. There are at the present time no dams in the Desplaines between dam No. 1 and the mouth of the river. Some of these dams were constructed as early as the year 1835, and their existence in the river was a source of obstruction to the commerce that had formerly been carried on. There are also a considerable number of bridges of various kinds across the river.

Is the river navigable within the Act of 1899? The main question in the case is whether the evidence shows the Desplaines a navigable stream of the United States, or one capable of bearing interstate commerce via the Illinois and Mississippi, at the time of the passage of the acts of 1890 and 1899. If the river be decided navigable in fact, though not used for navigation, the further question is whether the words "navigable river, or other navigable water of the United States" includes a stream of navigable capacity, but not actually used in transportation for the past seventy-five years. In other words does the Act of 1899 refer only to streams then actually used for interstate commerce, or as well to rivers formerly navigated, like the Wisconsin, Rock, and hundreds of other streams of perfect navigable capacity, but whose use long ago ceased as an instrument of commerce (except for water powers)?

The Act of 1890 provides that dams or other structures in navigable waters of the United States shall not be built without authority of the Secretary of War; and the Act of 1899 that when such navigable waters are wholly within a state, such structures may be built under authority of the state legislature if the plans are submitted to and approved by the Chief of Engineers and the Secretary of War. Under this legislation it has been established that dams or other structures may be built only by joint assent of the national and state governments. The effect of the Act of 1899, "reasonably interpreted, is to make the erection of a structure in a navigable river, within the limits of a state, dependent upon the concurrent or joint assent of both the national government and the state government. The Secretary of War, acting under the authority conferred by Congress, may assent to the erection by private parties of such a structure. Without such assent the structure cannot be erected by them. But under existing legislation they must, before proceeding under such authority, obtain also the assent of the state acting by its constituted agencies." *Cummings v. Chicago*, 188 U. S. 410, 47 L. Ed. 525, approved in *Going v. Ives*, 222 U. S. 370, 56 L. Ed. 235, *Simpson v. Shepard*, 230 U. S. 352, 408, 57 L. Ed. 1511, 1543, *Montgomery v.*

Portland, 190 U. S. 89, 23 S. C. 735, 47 L. Ed. 765. See also *Cobb v. Lincoln Park*, 202 Ill. 427, 67 N. E. 5, 95 A. S. R. 258, 63 L. R. A. 264.

It is argued that the Act of 1899 was passed under the constitutional power to regulate interstate commerce, and as no such commerce on the Desplaines then existed the statute can have no application; and that if the statute be construed to reach beyond this it was to that extent beyond the legislative power. Even so it might be sustained under the war power. We have lately had a significant reminder of the inadequacy of railroad transportation in a time of stress.

But however this may be, we think streams of actual navigable capacity, but not now used for interstate commerce, are within congressional power to preserve for purposes of future transportation, and that the Act of 1899 applies to such streams. If this is not the proper construction very few interstate streams are within its terms. The Wisconsin River, that great water route of early times between the St. Lawrence and the Mississippi, could be destroyed if the state permitted. The Rock River in Wisconsin and Illinois, a stream in its natural state completely navigable from Lake Koshkonong to the Mississippi, would be under no government protection however important for future need. It might be covered with business blocks in cities lying upon it, as was permitted by the Wisconsin Supreme Court in *State v. Carpenter*, 68 Wis. 65, 60 Am. Rep. 848. Hundreds of like streams, immensely important to the future welfare of the country, on this theory could never come within the reach of congressional power, except possibly through restoration by the states. We are unwilling to assent to this narrow view of the purpose of the Act of 1899, and think it should be construed to refer to navigable capacity (which is the test of navigable water), and not rigidly restricted to streams floating interstate or foreign commerce at the time of its passage. The question has never been decided by the Supreme Court or other federal tribunal.

The disposition of this case upon these facts may therefore well be narrowed down to the question, Was the Desplaines River navigable in its natural condition?

The purpose of the provision referred to in the Ordinance of 1787 was not to declare or make the Desplaines River, or other waterways within the ceded territory, navigable waters of the United States, but only to define rights which depend on its existence. *Illinois v. Economy Light & Power Co.*, 234 U. S. 497, 523, — Sup. Ct. —, — L. Ed. —. A further purpose was to retain forever the free and unrestricted use to the people of the country of any and all waterways then known to be navigable, or waterways that might thereafter be used by the people in the more remote parts of the country, for the purposes of commerce. In respect to waterways no additional power was granted by the ordinance to the newly created territory, either at the time of the cession or in 1818, when Illinois was admitted to the Union, over the power held by the original thirteen states, and the United States relinquished or lost none of its original power and control over the specific things included within its jurisdiction, one of the most important of which was the waterways.

The purpose of the Ordinance of 1787 is clearly stated by the court in *The Montello*, 20 Wall. 430, 444, — L. Ed. —, "to preserve the national character of all the rivers leading into the Mississippi and St. Lawrence, and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787, declaring them to be free to the public." It is immaterial to inquire whether the ordinance is still in force, or was superseded by the Illinois enabling act, or the act of admission, because the same principle is preserved in those statutes, and in the Illinois constitution. It is very evident that from the earliest days the intention of Congress has been to retain in the public for all time the right to the use of streams of navigable capacity. The Act of Congress of May 18, 1796, entitled "An Act providing for the sale of lands of the United States in the territory northwest of the River Ohio, and above the mouth of the Kentucky River," provides in section 9:

"And be it further enacted, that all navigable rivers within the territory to be disposed of by virtue of this Act, shall be deemed to be, and remain public highways."

The Act of Congress of March 26, 1804, entitled "An Act making provision for the disposal of public lands in the Indian Territory, and for other purposes," provides in section 6:

"That all navigable rivers, creeks and waters, within the Indian Territory, shall be deemed to be and remain public highways."

The contention of counsel for appellant that the carrying places between the streams cannot be held to be within the intent of Congress in preserving the right to the use of navigable streams, is not material in this case, for the reason that in the progress and improvement in the means and methods of transporting commerce those carrying places have become unnecessary. The fur trader of the early days had but one way to make his trip from Chicago to St. Louis; the waterways and the carrying places between. But the fact that changing methods have dispensed with the necessity for using the carrying places does not lessen in any degree the value of the navigable portions of the streams. It is also to be noted that the statutes of 1796 and 1804 referred to do not mention carrying places, but only refer to the waterways. If the carrying places were deemed of equal importance with the waterways they would undoubtedly have been mentioned in these acts.

In the leading case of *The Montello*, 87 U. S. 430, 22 L. Ed. 391, the court said at p. 441:

"And, independently of the Ordinance of 1787, declaring the 'navigable waters' leading into the Mississippi and St. Lawrence to be 'common highways,' the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor the difficulties attending navigation. If this were so, the public would be deprived of the use of many of the large rivers of the country over which rafts of lumber of great value are constantly taken to market.

It would be a narrow rule to hold that in this country, unless a river was capable of being navigated by steam or sail vessels, it could not be treated as a public highway. The capability of use by

the public for purposes of transportation and commerce affords the true criterion of the navigability of a river, rather than the extent and manner of that use. If it be capable in its natural state of being used for purposes of commerce, no matter in what mode the commerce may be conducted, it is navigable in fact, and becomes in law a public river or highway. Vessels of any kind that can float upon the water, whether propelled by animal power, by the wind, or by the agency of steam, are, or may become, the mode by which a vast commerce can be conducted, and it would be a mischievous rule that would exclude either in determining the navigability of a river. It is not, however, as Chief Justice Shaw said, (21 Pick. 344) 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.' * * * But the vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful Commerce. If this be so the river is navigable in fact, although its navigation may be encompassed with difficulties by reason of natural barriers, such as rapids and sand bars."

In *Miller v. Mayor of New York*, 109 U. S. 385, 3 Sup. Ct. 228, 27 L. Ed. 971, the court said at p. 395:

"The power vested in Congress to regulate commerce with foreign nations and among the several states includes the control of the navigable waters of the United States so far as may be necessary to insure their free navigation; and by 'navigable waters' are meant such as are navigable in fact, and which by themselves or their connection with other waters form a continuous channel for commerce with foreign countries or among the states." Citing *The Daniel Ball*, 10 Wall. 557.

In *The Daniel Ball*, 10 Wall. 557, 19 L. Ed. 999, the court said at p. 563:

"Those rivers must be regarded as navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the states, when they form in their ordinary conditions by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries in the customary modes in which such commerce is conducted by water."

In *St. Anthony Falls Water Power Co. v. Board of Commissioners*, 168 U. S. 349, 18 Sup. Ct. 157, 42 L. Ed. 497, the Mississippi River at and above St. Anthony Falls, Minneapolis, was held navigable. The court say:

"In order to be navigable it is not necessary that it should be deep enough to admit the passage of boats on all portions of the stream."

Navigability does not depend on the amount of tonnage, depth of water, width of the stream, nor the use at some time for com-

merce. Navigability is determined by natural conditions. *Gaston v. Mace*, 33 W. Va. 14, 10 S. E. 60, 5 L. R. A. 392, 25 Am. St. 848. Neither character of craft nor relative ease or difficulty of navigation are tests of navigability. *State v. Pacific Guano Co.*, 22 S. C. 50. "The test of navigability is navigable capacity without regard to the character of the craft, the business done, the ease of navigation, the surroundings of the stream." *Heyward v. Farmers Mining Co.*, 42 S. C. 139, 19 S. E. 963, 28 L. R. A. 42, 46 Am. St. 742. In *Stratton v. Currier*, 81 Mo. 497, the court held as correct an instruction that the stream being of sufficient capacity to float logs, the public had a right to its use for that purpose. So in this case, the Desplaines River having the capacity to carry interstate and foreign commerce, the public has the right to its use. In *Moore v. Sanborne*, 11 Mich. 519, the court holds that navigability consists in the capacity for valuable floatage. This case also holds that the Ordinance of 1787 supersedes the common law doctrine of the necessity of usage or custom to establish a public right. In *Burroughs v. Whitwam*, 59 Mich. 279, the court held that the Ordinance of 1787 was intended to apply to such streams as were then common highways for canoes or batteaux in the commerce between the north-western wilderness and the settled portions of the United States and foreign countries, and to such rivers not then in use as would by law be embraced in the definition of navigable waters. In *Ten Eyck v. Town of Warwick*, 27 N. Y. Supp. 536, 75 Hun 562, the court follows the reasoning in many of the cases cited, and says at page 539: "That is, streams must be capable, in their natural condition, of floating commodities to market," citing and quoting *Morgan v. King*, 35 N. Y. 461. In the latter case the court said:

"The true rule is that the public have a right of way in every stream which is capable, in its natural state and its ordinary volume of water, of transporting, in a condition fit for market, the products of the forests or mines, or of the tillage of the soil upon its banks. * * * Nor is it essential to the easement that the capacity of the stream, as above defined, should be continuous, or, in other words, that its ordinary state, at all seasons of the year, should be such as to make it navigable. It is ordinarily subject to periodical fluctuations in the volume and height of its water, attributable to natural causes, and recurring as regularly as the seasons, and if its periods of high water or navigable capacity ordinarily continue a sufficient length of time to make it useful as a highway, it is subject to the public easement."

In *Wadsworth, Admr. v. Smith*, 11 Me. 278, it is held:

"Those (streams) which are sufficiently large to bear boats or barges, or to be of public use in the transportation of property, are highways by water, over which the public have a common right."

In *Brown v. Chadbourne*, 31 Me. 11, the court at p. 22 said:

"A distinguishing criterion consists in the fitness to answer the wants of those, whose business require its use. Its perfect adaption to such use may not exist at all times, although the right to it may continue, and be exercised whenever an opportunity occurs. In

many rivers, where the tide ebbs and flows, the public are deprived of their use for navigation during the reflux of their waters. A way, over which one has a right to pass, may be periodically covered with water. In high northern latitudes, most fresh water rivers are frozen over during several months of the year."

The statement "A way, over which one has a right to pass may be periodically covered with water," gives rise to the suggestion that a river in the latitude of the Desplaines is ordinarily frozen over during some of the winter months; and in a new country where the roads, if any, are very poor and inadequate, such a river would afford an excellent highway, at least in many places, for teams drawing sleighs. In *Lewis v. Coffey County*, 77 Ala., 190, the court said at p. 193:

"We do not understand, that to constitute a navigable stream it is requisite there shall be sufficient water for the common uses of trade and commerce during all seasons of the year. It must, however, as the results of natural causes, be capable of valuable floatage periodically during the year, and so continue long enough at each period to make it susceptible of beneficial use to the public."

The same doctrine is announced in *Morrison Bro. & Co. v. Coleman*, 87 Ala. 655. In *Little Rock, &c., R. R. v. Brooks*, 43 Am. Rep. 277, (39 Ark. 463) the court after discussing the question of what constitutes navigable capacity, says:

"The true criterion is the dictate of sound business common sense, and depends on the usefulness of the stream to the population of its banks, as a means of carrying off the products of their fields and forests, or bringing to them articles of merchandise. If in its natural state, without artificial means, it may be prudently relied upon and used for that purpose at some seasons of the year, recurring with tolerable regularity, then, in the American sense, it is navigable, although the annual time may not be very long. Products may be ready and boats prepared, and it may thus become a very great convenience and materially promote the comfort, and advance the prosperity of the community."

Carter v. Thurston, 42 Am. Rep. 584 (58 N. H. 104).

In *East Hoquiam Boom & Logging Co. v. Neeson et al.*, 54 Pac. Rep. 1001, 20 Wash. 142, the court holds it to be well settled that a stream which can only be made navigable or floatable by artificial means is not a public highway, citing a number of cases. In *Kamm v. Normand*, 91 Pac. Rep. 448 (50 Ore. 9) the court after an extensive review of the authorities, holds that a stream to be navigable or floatable for saw logs must be capable in its natural condition at ordinary recurring freshets of being successfully and profitably used for that purpose.

Under these authorities it seems clear that the Desplaines River having been used as an interstate highway of commerce from 1673 to 1825 in the only kind of commerce then existing, is to be deemed of navigable capacity and a navigable stream within the Ordinance of 1787 and the acts of Congress of May 18, 1796 and March 26, 1804, by which Congress specifically took jurisdiction over navigable

streams and declared that they should forever remain public highways. The river is a continuous stretch of water from Riverside to its mouth, and although there is a rapid, and in places shallow water, with boulders and obstructions, yet these things do not affect its navigable capacity. The same may be said of the upper part of the Illinois River above the head of steamboat navigation. We have no hesitation in deciding that both streams are navigable and are within the Act of 1899.

The only hesitation we have had in this case is on account of the decision of the Supreme Court of Illinois in *Illinois v. Economy Light and Power Co.*, 241 Ill., 290, 89 N. E. 760. The difference in the records in the two cases would not perhaps warrant a different conclusion, although the evidence here is somewhat stronger in favor of navigability than in that case. Taking as we do a different view as to the force and effect of the historical accounts of the early use of the river, and being clear that it is in fact a navigable stream, we feel that we should follow our own views.

Decree affirmed.

A true Copy.

Teste:

_____,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

And afterwards, on the same day, to-wit: On the twenty-first day of January, 1919, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

TUESDAY, January 21, 1919.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Julian W. Mack, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. Arthur L. Sanborn, District Judge.

2525.

ECONOMY LIGHT AND POWER COMPANY

vs.

THE UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois, Eastern Division, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said District Court in this cause be, and the same is hereby affirmed.

And afterwards, to-wit: On the twentieth day of February, 1919, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Notice, which said Notice is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

To Messrs. Charles F. Clyne and Clarence N. Goodwin, Solicitors for Appellee:

You are hereby notified that on the 20th day of February, 1919, at the hour of 11 o'clock A. M., or as soon thereafter as counsel can be heard, we shall appear before the United States Circuit Court of Appeals in chambers and pray an appeal from the judgment of that Court entered in the above entitled cause on the 21st day of January, 1919, to the Supreme Court of the United States, and shall present and file the following papers, copies of which are herewith served upon you:

1. Petition for appeal,
2. Order allowing appeal,
3. Assignment of errors,
4. Citation,

at which time and place you may appear if you so desire.

FRANK H. SCOTT,
*Solicitor for Economy Light &
Power Company, Appellant.*

Received a copy of the above notice and of the papers therein mentioned this 19th day of February, 1919.

CLARENCE N. GOODWIN,

CHARLES F. CLYNE,

Solicitors for Appellee.

Endorsed: Filed Feb. 20, 1919. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twentieth day of February, 1919, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition for Appeal, which said Petition for Appeal is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Petition for Appeal.

The above named appellant, Economy Light & Power Company, conceiving itself aggrieved by the judgment of the United States Court of Appeals for the Seventh Circuit, made and entered in the above entitled cause on the 21st day of January, 1919, and by the decree of the District Court of the United States for the Eastern Division of the Northern District of Illinois thereby affirmed, does hereby appeal from said judgment of said Circuit Court of Appeals to the Supreme Court of the United States, for the reasons specified in the assignment of errors filed herein, and prays that this appeal may be allowed and that a transcript of the record, papers and proceedings upon which said judgment was made, may be sent to the Clerk of the Supreme Court of the United States at Washington, D. C.

FRANK H. SCOTT,

Solicitor for Appellant,

Economy Light & Power Company.

Endorsed: Filed Feb. 20, 1919. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twentieth day of February, 1919, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which said Assignment of Errors is in the words and figures following, to-wit:

In the United States Circuit Court of Appeals for the Seventh Circuit.

No. 2525.

ECONOMY LIGHT AND POWER COMPANY, a Corporation, Appellant,

vs.

UNITED STATES OF AMERICA, Appellee.

Assignment of Errors.

The Economy Light & Power Company, appellant in the above entitled cause, says that in the record and proceedings therein and in the judgment of the Circuit Court of Appeals for the Seventh Circuit entered therein on the 21st day of January, 1919, manifest error has occurred to the prejudice of the said appellant and it assigns for error the following:

1. Said Circuit Court of Appeals for the Seventh Circuit erred in affirming the decree of the United States District Court for the Eastern Division of the Northern District of Illinois of May 25, 1917.

2. Said Circuit Court of Appeals erred in not reversing said decree of said United States District Court for the errors assigned upon the record in said cause.

3. Said Circuit Court of Appeals erred in holding that the Desplaines River was a navigable stream in its natural condition.

4. Said Circuit Court of Appeals erred in holding that the Desplaines River is now a navigable stream.

5. Said Circuit Court of Appeals erred in holding that the Desplaines River is a navigable water of the United States.

6. Said Circuit Court of Appeals erred in holding that from the latter part of the Seventeenth Century to the first part of the Nineteenth Century men engaged in the fur trade passed up and down the Desplaines River in canoes and flat boats regularly and that such passage constituted commerce.

7. Said Circuit Court of Appeals erred in holding that supplies of various kinds needed by the settlers were transported over the Desplaines River during the period preceding 1825 and that commerce existed upon said river until the year 1825.

8. Said Circuit Court of Appeals erred in not reversing the decree of said United States District Court, upon the ground that the Desplaines River was not navigable in its natural condition.

9. Said Circuit Court of Appeals erred in not reversing the decree of the said United States District Court upon the ground that the Desplaines River is not now navigable.

10. Said Circuit Court of Appeals erred in not reversing the decree of the said United States District Court upon the ground that the Desplaines River is not now navigable.

11. Said Circuit Court of Appeals erred in not reversing the decree of the said United States District Court upon the ground that the Desplaines River is not, in fact, capable of navigation for purposes of useful commerce, and that neither Section 8 of Article I of the Constitution of the United States, nor the Act of Congress of March

3, 1899, nor any other Act of Congress is applicable to said stream.

12. Said Circuit Court of Appeals erred in holding that the Act of March 3, 1899, applies to streams capable of navigation but upon which no commerce exists.

13. Said Circuit Court of Appeals erred in holding that the power of Congress to regulate Interstate Commerce does not depend upon the Commerce Clause of the United States Constitution, but may be sustained under the War Power.

14. The said Circuit Court of Appeals erred in holding that the Act of March 3, 1899, applies to streams not navigable at the time of the passage of said Act.

15. The said Circuit Court of Appeals erred in holding that the Act of March 3, 1899, applies to streams upon which no commerce existed at the time of the passage of said Act.

16. The Act of March 3, 1899, as construed and applied by said Circuit Court of Appeals to the Desplaines River would be unconstitutional.

17. Said Circuit Court of Appeals erred in holding that the ordinance of 1787 was preserved in the Constitution of Illinois.

18. Said Circuit Court of Appeals erred in holding that the ordinance of 1787 supersedes the common law doctrine of the necessity of use or custom to establish a public right of highway in streams.

19. Said Circuit Court of Appeals erred in holding that Section 9 of the Act of Congress of May 18, 1796, entitled, "An Act providing for the sale of lands of the United States in the territory Northwest of the River Ohio and above the mouth of the Kentucky River", and Section 6 of the Act of Congress of March 26, 1904, are applicable to the Desplaines River.

20. Said Circuit Court of Appeals erred in not holding that the Act of March 3, 1899, is not applicable to the Desplaines River.

21. Said Circuit Court of Appeals erred in not holding that the Commerce Clause of the United States Constitution does not give to Congress power to control by legislation streams upon which no commerce exists.

22. Said Circuit Court of Appeals erred in not holding that the Commerce Clause of the United States Constitution does not give to Congress power to control by legislation streams upon which no commerce existed at the date of the passage of such legislation.

23. Said Circuit Court of Appeals erred in not holding that the War Power does not give to Congress power to control by legislation streams upon which no commerce exists.

24. Said Circuit Court of Appeals erred in not holding that the War Power does not give to Congress power to control by legislation streams upon which no commerce existed at the date of the passage of such legislation.

25. Said Circuit Court of Appeals erred in not holding that under the Commerce Clause of the United States Constitution Congress only has power to legislate with reference to streams navigable by the standards of navigation existing at the date of such legislation.

26. Said Circuit Court of Appeals erred in not holding that the Act of March 3, 1899, applies only to streams which were navigable by standards of navigation existing at the date of the passage of said Act.

27. Said Circuit Court of Appeals erred in not reversing the decree of said United States District Court upon the ground that if the Act of March 3, 1899, or any other Act of Congress mentioned in appellee's bill of complaint or relied upon by appellee, applies to Desplaines River, said Acts are null and void under the provision of the 5th Amendment of the Constitution of the United States forbidding the taking of property without due process of law, and the taking of private property for public uses without just compensation.

28. Said Circuit Court of Appeals erred in not reversing the decree of said United States District Court upon the ground that if said Act of Congress of March 3, 1899, or any other of the Acts of Congress mentioned in appellee's bill of complaint or relied upon by appellee should be held to establish the character of said Desplaines River as navigable, then said Acts, and each of them, are and is, unconstitutional notwithstanding the ordinance of 1787, or any of the Acts of Congress for the government of the Northwest territory.

29. Said Circuit Court of Appeals erred in not reversing the decree of said United States District Court upon the ground that the United States is estopped from now claiming or contending that the Desplaines River is a navigable stream.

30. Said Circuit Court of Appeals erred in not applying the test of navigability laid down by the Courts of Illinois as to streams within said State.

31. Said Circuit Court of Appeals erred in not following the decision of the Supreme Court of Illinois in the case of *People of the State of Illinois v. Economy Light & Power Company* and reversing the decree of said District Court of the United States upon the ground that said judgment of the Supreme Court of Grundy County thereby affirmed was a judgment in rem establishing the character of the Desplaines River as a non-navigable stream in a state of nature.

32. Said Circuit Court of Appeals erred in not following the decision of the Supreme Court of Illinois in the case of *People of the State of Illinois v. Economy Light & Power Company* and reversing the decree of said United States District Court upon the ground that said judgment of the Supreme Court of the State of Illinois and the decree of the Circuit Court of Grundy County thereby affirmed was a judgment in rem establishing the character of the Desplaines River as a non-navigable stream notwithstanding the additional flow of water turned into the stream from the Sanitary District channel.

By reason of the foregoing errors, and others appearing upon the face of the record, appellant prays that the said judgment of the United States Circuit Court of Appeals for the Seventh Circuit and the decree of the said United States District Court for the Eastern Division of the Northern District of Illinois entered May 25, 1917, may be reversed and the cause remanded with instructions to said United States District Court to enter a decree in favor of appellant and dismissing the appellee's bill of complaint.

FRANK H. SCOTT,
Solicitor for said Appellant,
Economy Light & Power Company.

Endorsed: Filed Feb. 20, 1919. Edward M. Holloway, Clerk.

And afterwards, on the same day, to-wit: On the twentieth day of February, 1919, in the October Term last aforesaid, the following further proceedings were had and entered of record, to-wit:

THURSDAY, February 20, 1919.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.
John J. Bradley, Marshal.

Before Hon. Francis E. Baker, Circuit Judge.

2525.

ECONOMY LIGHT & POWER COMPANY

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon motion of Frank H. Scott, solicitor for Economy Light & Power Company, appellant in the above entitled cause, due notice of said motion having been given the appellee, United States of America, by notice served upon Charles F. Clyne, United States District Attorney, and Clarence N. Goodwin, Special Counsel, its solicitors, it is ordered that an appeal to the Supreme Court of the United States from the judgment entered by this Court in the above entitled cause on, to-wit, the 21st day of January, 1919, be, and the same hereby is allowed upon the giving of a bond (such bond to be in the amount to be agreed upon by counsel for appellant and appellee and if not agreed upon to be hereafter fixed by this Court), within twenty (20) days to be approved by one of the Judges of this Court, conditioned according to law, and that a transcript of the record and proceedings herein, except the original book of maps, shall be transmitted to the Clerk of the Supreme Court of the United States, at Washington, D. C.

It is further ordered that the original book of maps shall be transmitted to the Clerk of the Supreme Court of the United States to be by him safely kept and returned to this Court upon the final determination of this cause in said Supreme Court.

It is further ordered that the mandate of this Court shall be stayed until the expiration of the time for filing of bond as herein

provided, and that upon the filing and approving of said bond the same shall operate as a bond for costs and damages on appeal and also as a supersedeas and a stay of further proceedings herein, pending the determination of said appeal in the Supreme Court of the United States.

And afterwards, to-wit: On the twelfth day of March, 1919, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, March 12, 1919.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Edward M. Holloway, Clerk.

Before Hon. Evan A. Evans, Circuit Judge.

2525.

ECONOMY LIGHT & POWER COMPANY

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now comes the Economy Light and Power Company, appellant herein, and presents its appeal bond herein with National Surety Company as surety in the sum of Five Thousand Dollars (\$5,000.00), which bond is hereby approved and ordered filed.

And afterwards, on the same day, to-wit: On the twelfth day of March, 1919, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Bond, which said Bond is contained in the order following herewith.

And afterwards, on the same day, to-wit: On the twelfth day of March, 1919, in the October term last aforesaid, the following further proceedings were had and entered of record, to-wit:

WEDNESDAY, March 12, 1919.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.

Hon. Samuel Alschuler, Circuit Judge.

Hon. Evan A. Evans, Circuit Judge.

Edward M. Holloway, Clerk.

Before Hon. Evan A. Evans, Circuit Judge.

2525.

ECONOMY LIGHT & POWER COMPANY

VS.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Now this day comes the Economy Light and Power Company by its counsel and presents and files its bond, which said bond is in the words and figures following, to-wit:

Know all men by these presents, That Economy Light & Power Company, a corporation, as principal, and National Surety Company as surety, are held and firmly bound unto the United States of America in the full and just sum of Five Thousand Dollars (\$5,000.00) to be paid to the said United States of America, to which payment well and truly to be made we bind ourselves and our successors, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 28th day of February, in the year of our Lord one thousand nine hundred and nineteen.

Whereas, lately at a session of the United States Circuit Court of Appeals for the Seventh Circuit in an appeal pending in that Court from a decree of the United States District Court for the Eastern Division of the Northern District of Illinois, entered on the 25th day of May, 1917, in favor of the appellee, United States of America, and against the appellant, Economy Light & Power Company, the said decree of the said United States District Court was affirmed by said Circuit Court of Appeals and judgment entered in said Court on to-wit: the 21st day of January, 1919; and

Whereas, the appellant has obtained from said Circuit Court of Appeals an order allowing an appeal to the Supreme Court of the United States to review the judgment of said Circuit Court of Appeals and a Citation directed to the United States of America is about to

be issued citing and admonishing the said United States of America to be and appear at the Supreme Court of the United States to be holden at Washington in the District of Columbia.

Now, Therefore, the Condition of the above obligation is such that if the said appellant, Economy Light and Power Company, shall prosecute its said appeal with effect and shall answer all damages and costs that may be awarded against it if it fail to make its plea good, then the above obligation is to be void; otherwise to remain in full force.

ECONOMY LIGHT & POWER COMPANY,
By CHARLES A. MONROE,

Its President.

NATIONAL SURETY COMPANY,
By W. HERBERT STEWART,

Its Attorney in Fact.

W. HERBERT STEWART. [SEAL.]

O. K. as to form & amount.

C. N. G.,

Sp. Ass't to Att'y Gen.

2525.

ECONOMY LIGHT & POWER COMPANY

vs.

UNITED STATES OF AMERICA.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Upon application of counsel for appellant, It is ordered that the time to docket cause and file the transcript of the record in the Supreme Court of the United States be, and the same is hereby extended sixty (60) days from March 22, 1919.

United States Circuit Court of Appeals for the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing typewritten and printed pages, numbered from 1 to 40, inclusive, contain a true copy of the proceedings had and papers filed (except the Order of October 27, 1917 relating to the filing, etc. of the printed record, the briefs of counsel and stipulations relating thereto) in the case of Economy Light and Power Company vs. United States of America, No. 2525, October Term, 1916, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this fifth day of May, A. D. 1919.

[Seal United States Circuit Court of Appeals, Seventh Circuit.]

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

Citation.

The President of the United States to the United States of America,
Charles F. Clyne, United States Attorney, and Clarence N. Goodwin, Special United States Attorney, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at the City of Washington in the District of Columbia, within thirty (30) days from the date hereof, pursuant to an order allowing an appeal entered in the office of the Clerk of the United States Circuit Court of Appeals for the Seventh Circuit in a certain action therein pending, No. 2525, in which the Economy Light & Power Company is appellant and the United States of America is appellee, to show cause, if any there be, why the judgment rendered against the said appellant and in favor of the appellee as mentioned in the said order allowing the appeal, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Francis E. Baker, one of the Judges of said United States Circuit Court of Appeals for the Seventh Circuit, this 20th day of February, A. D. 1919.

FRANCIS E. BAKER,
Circuit Judge.

Service of the within citation and receipt of the copy thereof is admitted this 10 day of March, A. D. 1919.

CLARENCE N. GOODWIN,
Sp. Ass't to the Att'y Gen.

STATE OF ILLINOIS,
County of Cook, ss:

Edgar Shroeder, being first duly sworn deposes and says that he served the above and foregoing citation upon Charles F. Clyne, United States Attorney, on the 11th day of March, A. D. 1919, by delivering a copy thereof to W. H. Small, chief clerk in the office of the said United States Attorney, at the office of said United States Attorney, in the City of Chicago, Illinois; that he served said citation upon the Attorney General of the United States and upon

the Solicitor General of the United States by mailing a copy thereof to each of them on the 10th day of March, 1919, by registered mail in envelopes properly stamped and addressed to said respective officers, at the City of Washington, D. C.

EDGAR SCHROEDER.

Subscribed and sworn to before me this 12th day of March, A. D. 1919.

[SEAL.]

ALLEN E. DENTON,
Notary Public.

[Endorsed:] 2525. United States Circuit Court of Appeals for the Seventh Circuit. Economy Light & Power Company, a corporation, appellant, vs. United States of America, Appellee. Citation. Filed Mar. 15, 1919. Edward M. Holloway, Clerk. Scott, Bancroft, Martin & Stephens, Attorneys at Law, Corn Exchange Bank Building.

Endorsed on cover: File No. 27,103. U. S. Circuit Court Appeals, 7th Circuit. Term No. 365. Economy Light & Power Company, appellant, vs. The United States of America. Filed May 13th, 1919. File No. 27,106.



MAR 30 1920

JAMES D. MAHER,
CLERK

IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. **105** 104

ECONOMY LIGHT & POWER COMPANY,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

BRIEF AND ARGUMENT FOR APPELLANT.

FRANK H. SCOTT,
Attorney for Appellant.

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IN THE
Supreme Court of the United States.

OCTOBER TERM, A. D. 1919.

No. 365.

ECONOMY LIGHT AND POWER COMPANY,
A CORPORATION, *Appellant,*
vs.
UNITED STATES OF AMERICA,
Appellee.

APPEAL FROM UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

MAY IT PLEASE THE COURT:

This is an appeal from a judgment of the Circuit Court of Appeals for the Seventh Circuit affirming a decree enjoining appellant from completing the construction of a dam upon its own property in, and a short distance above the mouth of, the DesPlaines River, at Dresden Heights, between Joliet and the Illinois River. Two grounds for injunction are alleged in the bill of complaint. The larger part of the bill is devoted to setting up a claim that the title to the bed is in the United States. The other ground is that the dam was being constructed in a navigable waterway of the United States, in violation of Section 9 of the River and Harbor Act of March 3, 1899, Ch. 425.

We shall state the pleadings and facts more fully hereinafter. At present, we inform this court:

1. That the claim of navigability of the DesPlaines River, as attempted to be made out by the appellee's evidence, is confined to a portion of it which is wholly within the State of Illinois.

2. That the Supreme Court of Illinois, in a proceeding brought by the state against this appellant to restrain the construction of this same dam, and upon substantially the same evidence as is here presented, has found the DesPlaines River not to be a navigable stream, and that appellant had the right to construct the dam. (241 Ill., 290.)

3. That the evidence showed, and the trial court and the Court of Appeals in their opinions found, that there was not at the time this action was begun, nor when the decree was entered, nor at any time within the memory of man, any commerce upon this river to be obstructed.

4. That the river is, and has been for years, obstructed by numerous substantial railroad and highway bridges; that dams have existed in the portion of it in question since the earliest settlement of the adjacent country and that it is obstructed by a large dam at Joliet owned by the State of Illinois.

5. That the lower courts in their opinions based their conclusion that the river is a navigable stream solely on the fact that there is some evidence that prior to the Ordinance of 1787 and to early legislation of Congress for the government of the Northwest territory, the river was used to some extent by explorers and fur traders, and they held that because the Ordinance and those early Acts of Congress enacted after the adoption of the Constitution, provided that all navigable waters leading to the Mississippi and St. Law-

rence Rivers should be common highways and forever free without impost or duty, therefore, and for that reason alone, the DesPlaines is to be regarded as a navigable stream within the Act of Congress under which the suit was brought and within the Commerce clause of the Constitution.

6. That before the enterprise of building the dam was entered upon, and years before this suit was begun, the plans were in fact submitted to the Chief of Engineers and the Secretary of War, who ruled that the DesPlaines River was not a navigable waterway of the United States, and that the projectors of the enterprise were assured in writing that there was no objection on the part of the Government to the building of the dam, which, as the engineers stated, would be a benefit to the United States if it should ever undertake to make the DesPlaines navigable.

THE PLEADINGS.

I.

THE BILL.

The bill was filed December 14, 1909 (pp. 3188-3201).

As said above, relief was prayed for on two grounds: (1) that the portion of the river bed on which the dam was being constructed was the property of the United States; (2) that the DesPlaines River was a navigable waterway of the United States and that appellant was constructing the dam without having obtained the consent of Congress and without the authority of the Legislature of Illinois, thereto, and without having had the plans thereof approved by the Chief of Engineers and by the Secretary of War, as required by the Act of Congress of March 3, 1899, Ch. 425, hereinafter quoted (pp. 7-8).

CLAIM OF TITLE TO THE BED OF THE STREAM.

The bill recited that by Act of Congress of March 2, 1827, there was granted to the State of Illinois land for the purpose of aiding in opening a canal between the Illinois River and Lake Michigan; that prior thereto the United States had made a survey of public lands adjacent to the DesPlaines River, including the portion thereof in which the dam in question was being constructed, and had caused the river to be meandered, which surveys became part of the public records of the United States; that the construction of the Illinois and Michigan Canal was begun in 1837, and completed in 1848; that by an act of February 26, 1839, the State of Illinois provided for the sale and disposal of the lands so granted, and among other things that

“lands situated upon streams which have been meandered by the surveys of public lands by the United States shall be considered as bounded by the lines of those surveys, and not by the stream”;

It alleged that by this Act the Legislature declared it to be its understanding that the grant of March 2, 1827, did not include the land and the river bed within said meander lines, and that therefore the State of Illinois did not accept from the United States any grant thereof. The bill further recites that in 1843 the State for the purpose of raising a fund to complete the canal, conveyed the canal itself and all the remaining lands and lots belonging to the canal fund, to a board created by the Legislature, and known as the Board of Trustees of the Illinois and Michigan Canal; that the board caused a survey of such lands to be made, upon which the meander lines of the DesPlaines River as shown by the Government Survey were designated as the boundaries of the lands granted by the United States and accepted by the State of Illinois under the Act of March 2, 1827; that by deed dated October 22, 1860, the board of trustees conveyed to one Boyer, certain lands by description, and that the portion of the DesPlaines River in which the dam had been commenced by appellant, flows through the lands described in the deed to Boyer; that appellant claims title to this land through mesne conveyances from Boyer. But the bill alleges that because of the provision above quoted from the Act of the Legislature of Illinois of March 2, 1827, no title to the bed of the stream passed to Boyer, and that that portion of the river bed is the property, and subject to the control, of the United States.

The District Court in its opinion found that this theory of ownership in the United States as a ground for injunction, was untenable (p. 3238), and though the claim was asserted in the argument in the Court of Appeals, no reference was made to it in the opinion of that court.

THE CLAIM, AS SET OUT IN THE BILL OF COMPLAINT, THAT
THE DESPLAINES RIVER IS A NAVIGABLE WATER OF THE
UNITED STATES.

To sustain the second claim the bill alleged that the portion of the DesPlaines River in question was covered by the following Acts and Ordinance, and became by virtue thereof, and is, navigable water of the United States:

1. An Act of the Illinois Legislature of February 28, 1839, declaring the DesPlaines River from a point where it most nearly connects itself with the Illinois and Michigan Canal *to its sources within the boundaries of Illinois*, to be navigable.

(The point here referred to is above the portion of the river claimed in this suit to be navigable, and no attempt was made to prove that the portion referred to in the Act was ever in fact navigable.)

2. The Ordinance of 1787 for the government of the Territories, providing that the navigable waters leading to the Mississippi and St. Lawrence Rivers *and the carrying places between* the same, should be common highways, and forever free, without tax, impost or duty.

3. The Statute of the United States of 1846, Ch. 89, Sec. 3, admitting Wisconsin into the Union as a State, which enacted that the Mississippi and other rivers bordering on the states, shall be common highways, etc.

It further alleged that the portion of the river in which appellant had commenced construction of the dam, was in its natural condition navigable in fact; that upon completion of the Illinois and Michigan Canal the portion of the river below the point of its connection with the canal, by reason of its connection with the canal and the Illinois River, formed part of a continuous highway

for commerce embracing Lake Michigan, the Chicago River, the Illinois and Michigan Canal, the DesPlaines and Illinois Rivers, and the Mississippi River, and regardless of obstructions and shallow places, was part of the navigable waterways of the United States.

(As a matter of fact the Illinois and Michigan Canal leaves the river at a point some fifteen miles north of the site of the dam, and has no connection with the DesPlaines or Illinois from that point, until it reaches its terminus at La Salle.)

The bill further alleged that under an Act of the Legislature of Illinois of May 29, 1889, the Sanitary District of Chicago had constructed a canal connecting the Chicago and DesPlaines Rivers, at a point above the portion of the river in which the dam was being constructed, which Sanitary District Canal, since its opening in 1900, has been and is part of the navigable waters of the United States, and that thereby the quantity of water flowing through the DesPlaines River has been largely increased, and that the portion in question is now water navigable in fact; that with the exception of rapids at certain places in the river between Joliet and the Illinois River, the river

“has been, since the opening of said sanitary district canal, and now is, capable of being navigated for the purposes of commerce, and that difficulties arising on account of said rapids above mentioned, are capable of being overcome through the improvement of said river by locks, canals and dams.”

The bill set out the portion of the Act of March 3, 1899, Ch. 425, on which complainant relied, which is as follows:

“That it shall not be lawful to construct or commence the construction of any bridge, dam, dike or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water

of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of War; provided, that such structures may be built under authority of the legislature of a state across rivers and other waterways the navigable portions of which lie wholly within the limits of a single state, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of War before construction is commenced."

The bill alleged that appellant had never obtained the consent of Congress to the building of the dam, nor had the plans been approved by the Chief of Engineers and by the Secretary of War; that the structure so far as completed, was in violation of the Act of March 3, 1899, and that if completed it would be a permanent obstruction of the river. The prayer of the bill has been stated above.

The bill did not allege that there was any commerce on the river to be obstructed. The only suggestion that there ever had been any is in the allegation that

"upon the completion of the Illinois and Michigan Canal said portion of said DesPlaines River, below the point of its connection with said canal and the Illinois River, formed a part of a continuous highway for interstate and foreign commerce embracing Lake Michigan, the Chicago River, the Illinois and Michigan Canal, the DesPlaines and Illinois Rivers and the Mississippi River."

There was not a particle of evidence tending to sustain this allegation, and the fact is as found by the trial judge in his opinion, that there is "No evidence of actual navigation within the memory of living man" (p. 3237), and the Court of Appeals, in its opinion, said that this was shown by the record.

THE DEMURRER AND ANSWER.

Defendant demurred and answered the bill. (Answer, pp. 3203-3233.) Among other grounds of demurrer specified were the following: (6) That the bill alleged that the DesPlaines River became navigable water of the United States by virtue of the Ordinance of 1787; (7) that the bill alleged that by virtue of the Act of the Legislature of Illinois of February 28, 1839, the portion of the DesPlaines River referred to in that act became navigable water of the United States; (8) that the bill alleged that by the Act of Congress admitting Wisconsin into the Union, the portion of the river in Wisconsin became navigable water of the United States; (9) that the bill did not allege that the dam would interfere with commercial navigation upon said river; (10) that the bill did not allege that there was any commercial navigation upon the river which would be interfered with or obstructed by the completion or maintenance of the dam; (11) that the bill showed that defendant was in possession of the land and river within the meander line referred to, under *bona fide* claim of title, and that its object was to divest defendant of its title thereto, and that defendant, by virtue of the Seventh Amendment to the Constitution of the United States, and Section 5 of Article 11, of the Constitution of Illinois, had a right to have its title determined in a court of law by a jury.

The demurrers were overruled in the final decree.

Answering, the defendant admitted that it had commenced the construction of the dam without the consent of Congress or the authority of the Legislature of Illinois, or the approval of the plans by the Chief of Engineers or the Secretary of War (except as later stated in the answer). It averred that by the legislation set out in the bill concerning the Illinois and Michigan Canal,

and the selection of lands thereunder by the canal commissioners, each alternate section along the route of the canal, including the land and river bed within the meander lines of the DesPlaines River in Section 25—the site of the dam—became vested in the State of Illinois, with full power in the State to sell and convey the same. It admitted that the United States, during the year 1821, caused a survey to be made of public lands along the DesPlaines River, including the portion where the dam was under construction, but denied that it caused the river to be meandered, or that surveys showing the meander lines became a part of the public records of the United States relating to public lands.

The answer denied that by the Act of the Illinois Legislature of February 26, 1839, it was provided that

“that lands situated upon streams which have been meandered by the surveys of public lands by the United States shall be considered as bounded by the lines of those surveys, and not by the stream,”

but averred that the Act provided that certain conditions, of which one was expressed in the language quoted, should be annexed to, and compose a part of, the contract in all sales of land and lots thereunder, but it denied that the State did not accept from the United States the land and river bed within the meander lines, and averred that at all times the State had insisted that the title thereto passed to the State from the United States. The answer further alleged that if in fact the DesPlaines is a navigable river, then the title to its bed passed from the United States to the State upon its admission into the Union in 1818.

The answer admitted that defendant's title was derived as stated in the bill, but denied that it had no title to the bed of the stream or the land within the meander lines. It admitted that the Illinois and Michigan Canal since

its completion in 1848, had been an artificial navigable waterway connecting the Chicago and Illinois River, that it connects with the DesPlaines River near Joliet, and follows the bed of that stream for a distance of between one and two miles, diverging from it about fifteen miles above the point where the dam was being constructed, and from the point of divergence paralleling the DesPlaines and Illinois Rivers to La Salle, where it connects with the Illinois River.

It averred that the dam was not in that part of the DesPlaines referred to in the Illinois Act of February 28, 1839, and that it is not competent for the State to create a navigable stream by a statutory declaration of navigability. It alleged that the Ordinance of 1787 ceased to have any effect upon the admission of Illinois into the Union. It denied that the provisions of the statute of the United States of 1846, admitting Wisconsin into the Union, applied to the DesPlaines River, or that that statute, or the Ordinance of 1787, had the effect of making the DesPlaines, or any portion of it, navigable waters of the United States. It denied that that river was in its natural condition, or after the completion of the Illinois and Michigan Canal, or the Sanitary District Canal, actually used or capable of being used for purposes of navigation, or for purposes of useful commerce, and averred that it could only be made navigable by entirely changing the character of the river, and making a navigable stream where none had before existed. It was further averred that for over a hundred years the United States had treated the DesPlaines as a nonnavigable stream; that it had several times had it surveyed for the purpose of ascertaining the possibilities of creating a navigable channel therein, but that the reports of its engineers making such surveys had shown that it was not a navigable stream, and that it had without protest, per-

mitted dams and bridges to be constructed over it from the earliest days down to the present time, without its consent, and had never attempted to exercise any jurisdiction over any part of it.

Certain facts as to the history of the proposed enterprise, and the full correspondence between its projectors and the War Department prior to entering upon it, showing that it met with the full approval of that Department, and the opinion of Secretary of War Taft that no permit was necessary to put any obstruction in the DesPlaines River, because it was not a navigable stream, are set out in full in the answer. (pp. 3213-3228.) Details of these matters will not be referred to here, as it will be necessary to go into them at some length, in the argument. It is sufficient to say here that the answer alleged that it was in reliance upon this attitude, and these acts, of the United States, that defendant began the construction of the dam, and in connection therewith, expended large sums of money, and incurred liabilities for other large sums, and it averred that in view of these facts the present action of the United States as to the navigability of the stream was unjust and inequitable.

The answer set up and relied on a decree in favor of this appellant of the Circuit Court of Grundy County, Illinois, in an action brought by the State of Illinois, to restrain the erection of the same dam, which decree was affirmed by the Supreme Court of Illinois October 26, 1909, the latter court holding that the title to the bed of the stream was in this appellant, and that the stream itself was not navigable; the answer alleged that the decree of the State court constituted a judgment *in rem* as to both points.

The answer admitted that the Sanitary District Canal was navigable, but denied that it was navigable water of

the United States, or subject to the jurisdiction and control of the Federal Government. It averred that the act of the Illinois Legislature under which it was constructed provided that whenever the Federal Government, after the water should have been turned into the Sanitary District Canal should improve the DesPlaines and Illinois Rivers for navigation to connect with the Sanitary District Canal, it should have full control over that Canal for navigation purposes, but not to interfere with its control for sanitary or drainage purposes; but it averred that the general Government had not improved those rivers for navigation or otherwise, and had no control over the Sanitary District Canal.

The answer denied that Section 9 of the Rivers and Harbor Appropriation Act of March 3, 1899, Ch. 425, has any application to the DesPlaines River; it alleges that the purpose of the act was to protect commerce, and that there was no commerce on the DesPlaines to be protected, and that it was not a navigable water of the United States.

Leave was given to appellant to amend its answer to conform to the evidence and the arguments made in the cause.

The amendment to the answer appears at pp. 3235-3236. It averred that the DesPlaines River was not in 'fact, capable of navigation for purposes of useful commerce, and that neither Section 8, Article 1 of the Constitution of the United States, nor the Act of Congress of March 3, 1899, nor any other Act of Congress is applicable to such a stream; that there was not, and had not been within the memory of mankind, any commerce upon the DesPlaines River, and that Congress had no power to control or regulate the use of the river; that if the Act of March

3, 1899, or any of the acts mentioned in the bill, or relied on by complainant, should be held to establish the character of the DesPlaines River as navigable, then said acts are unconstitutional, notwithstanding the Ordinance of 1787, or any of the Acts of Congress for the government of the Northwest territory.

STATEMENT OF FACTS.

It will be necessary, in the argument, to refer in detail to historical facts concerning the DesPlaines River, and also to the circumstances connected with the projected enterprise. Therefore, to avoid repetition, a very brief statement of facts will be made at this point.

The acquiring of the necessary lands to develop the water power near the mouth of the DesPlaines River, was begun by Frank G. Logan and Charles A. Munroe in the spring of 1904. (Tr., 3182.) Appellant, the Economy Light & Power Company, had no interest in that enterprise until all the properties necessary for the construction of the dam, and to be affected by the flowage resulting therefrom, had been acquired. The lands thus acquired, aggregated some 1,700 acres. Thereafter the owners made all necessary financial arrangements for constructing the dam and works. But in April, 1906, negotiations were entered upon with appellant which resulted in the sale of all the properties to the latter in November of that year.

Appellant, at the time of the purchase, executed a mortgage securing \$3,000,000 of bonds, the security being the properties in question and other properties owned by appellant. Two million dollars of these bonds were sold for the purpose of raising money to pay for the proposed dam and power house. Contracts were entered into by appellant for the construction work and for the purchase of necessary machinery, and several hundred thousand dollars were spent, and contracts involving other large amounts were entered into before the work was interrupted at the suit of the State of Illinois. (Tr., 2198-2199, 3184-3185.)

Both the State of Illinois and the United States have always treated the DesPlaines River as an unnavigable stream, which the riparian owners had the right to bridge and dam as they saw fit.

As early as 1826 a dam was built practically at the site of that proposed to be built by appellant. Private dams existed on the river until taken and paid for by the State in the construction of the Illinois and Michigan Canal and of the Sanitary Channel. At the time of the trial there were thirteen bridges between Joliet and the mouth of the river being the portion of the river in which appellant was erecting its dam, and fifty bridges between Lockport and Irving Park. (pp. 1037-39.) Surveys had been made by the United States as to the feasibility of making improvements in the river in case it should ever be deemed desirable to do so. In 1905 the Ernst Board of Engineers had made a report upon a survey for a fourteen-foot waterway from Lockport to the mouth of the Illinois River. In order that he might know whether the project of building the dam would, in the language of the Chief of Engineers, General MacKenzie, "be in harmony with the work of improvement proposed by the Government," Munroe, before the sale to appellant, laid the plans before the War Department, and it assured him that they would harmonize with the tentative plans for such improvement. And not only that; the Government engineers declared that the dam would save the Government a large sum in case it ever undertook the improvement of the river for navigation. The War Department, however, and the Secretary of War, pronounced the stream to be unnavigable. The circumstances of the submission of these plans appear in more detail hereafter at page 81.

While the work was in progress, and on December 30,

1907, the State of Illinois brought an action against the present appellant in the Circuit Court of Grundy County to prevent the construction of the dam. The proceeding was by information. Among other things, it was claimed that the DesPlaines was a navigable waterway of the United States, and that the dam was being built contrary to the provisions of the Act of March 3, 1899. An injunction was issued restraining the further prosecution of the work. The case was tried before the Honorable Julian W. Mack, judge of the Circuit Court of Cook County, and decided in favor of the Economy Light & Power Company, the court finding that the DesPlaines was not a navigable stream. The State took an appeal to the Supreme Court of Illinois, which affirmed the decree on October 26, 1909, in a very extended opinion reported in the 241 Ill., 290. A writ of error was taken by the State to the Supreme Court of the United States, which was dismissed for want of jurisdiction in an extended opinion June 2, 1914. (*State v. Economy Light & Power Company*, 234 U. S., 497.) In the meantime, and after the decision of the State Supreme Court, the present action was brought by the Attorney General of the United States. The argument was concluded in the trial court February 22, 1913, the case taken under advisement by Judge Landis, and decree was rendered in favor of the United States on the 25th of May, 1917. This decree was affirmed by the Court of Appeals January 21, 1919, from which order this appeal is taken.

The bulk of the material evidence in the trial of the instant case was that given in the State case and read into this record by stipulation. All the evidence shows that the DesPlaines River, either in its natural condition, or as augmented by artificial works, has never been used or been capable of be-

ing used, for purposes of navigation. The records of early explorers and adventurers, the testimony of early settlers, the fact that all their supplies were brought in and all their produce carried out in wagons, the reports of engineers to select the line of the canal, the act of the State in building the canal paralleling the river, the reports of United States engineers making surveys for a deep waterway, and the opinion of experts,—all conclusively establish this fact.

The trial court and the Court of Appeals found that there never had been any navigation on the river within the memory of living man but rested their decisions upon a definition of navigable waters of the United States, which is not sanctioned by any authority, and which, if adopted, would include streams over which the Government under the Commerce clause of the Constitution, can have no jurisdiction.

DESCRIPTION OF THE RIVER FROM LOCKPORT TO ITS MOUTH,
AND OBSTRUCTIONS IN IT.

What purports to be a description of the river, contained in the opinion of the Court of Appeals is largely not a description of the river as it exists. We shall show in the argument to follow that what the court describes is an attempted reproduction of the river as it was supposed by a witness, Cooley, to have existed in a state of nature. Cooley asserted that an engineer could reproduce the DesPlaines just as Cuvier could reproduce an extinct mammal, or Agassiz a fish from bones that are left. We shall show that the most important "bones" were missing, and that Cooley began his attempted reproduction by assuming without data, that they were of a certain character. All that is said in the opinion of the Court of Appeals, as to possi-

bilities of boats passing up and down the river and across the Chicago Divide refers to this assumed "state of nature," which it is admitted, and indeed strenuously insisted, has not existed for upward of seventy years.

We shall further point out in the argument, that the reference by the Court of Appeals to the Riverside gauge readings is very misleading since the elevations in the gauge refer to the levels above Chicago datum, and not to depths, the reading of 11 feet 4 inches representing no water in the river except in pools.

The distance from Lockport to the mouth of the river is 20 miles. The fall of the river from Lockport to Joliet is about 38 feet in $4\frac{1}{2}$ miles. From Dam No. 1 in Joliet to the head of what is known as Lake Joliet, there is a fall of 21 feet in $3\frac{1}{2}$ miles. Lake Joliet is a pool about 5 miles in length with but little fall. Below the foot of Lake Joliet the river divides and forms what is called Treat's Island. The main channel is on the left of that island and there is a fall in it of $9\frac{1}{2}$ feet in $1\frac{1}{10}$ th miles, and that fall is concentrated at the head and foot of the island.

After passing Treat's Island the river is again united and forms a pool about one mile long, in which there is very little fall. In the next stretch there is a fall of about $2\frac{7}{10}$ th feet in one mile. Then follows a pool described in the opinion of the Court of Appeals, inadvertently as 13 miles long but which is in fact 3 miles long, where there is a fall of two feet in 3 miles; and in the last half mile above the mouth of the river, there is a fall of $3\frac{1}{2}$ feet. It is across the lower end of this stretch that the proposed dam is to be located. The bottom of the river from Lockport to the dam in question, with the exception of that portion along Lake Joliet,

is covered with a large number of bowlders of various sizes, some of them between two and three feet in diameter. (pp. 2210, 2637, 2639, 2640, 2643, 2655.) The Supreme Court of Illinois, in *People v. Economy Light & Power Co.*, 241 Ill., 290, upon practically the same evidence, said:

"The evidence shows that these bowlders are of various sizes, some of them between two and three feet in diameter. Some of them are covered entirely with water, while others project slightly above the surface of the water. It is also shown that in going down the river in a skiff or any kind of boat there is great danger of coming in contact with these bowlders. The current is so strong that it is not possible to row a boat upstream over these rapids. In addition to the natural barriers already spoken of, the evidence shows that the stream is tortuous and the channel very narrow at places. The slopes in the river already given do not represent the greatest fall that can be found in this stretch. The evidence shows that there is near the head of Treat's Island a fall of seven or ten feet to the mile, and near the foot the slope is eighteen feet to the mile, and in the right-hand channel opposite Treat's Island there is a space of five hundred feet in which the fall is fifty feet to the mile, and if shorter distances are taken even greater slopes than these will be found to exist. At one place near the mouth of the river there is a fall for three or four hundred feet of twenty feet to the mile. Between the mouth of the river and Lockport there are thirteen bridges across the river, none of which have draws to permit the passage of boats, if such passage were otherwise possible. Two of these bridges are railroad bridges, and all of them are permanent steel structures. Above Lockport there are some forty other bridges across the stream, constructed for steam or electric railroads and for wagons. The width of the river varies greatly. At some places it is not more than sixty feet wide, while in the widest place in Lake Joliet it is over one thousand feet wide. The evidence shows that the depth of water in the

river varies considerably in different places and also at different times in the same places. A chart showing the gauge readings at Riverside, a point twenty-eight miles above Joliet, shows the number of days in each year during which the river was dry at this point, which indicates that there were from twenty-four days in 1890 to two hundred and thirteen days in 1895 during which the river was dry at this point. This chart also shows the number of days during each of these years when there was a discharge of less than six inches of water at Riverside, the result of which is, totaling the number of dry days and the days showing less than a six-inch discharge, that there were from one hundred and twenty days in 1888 to three hundred days in 1901 when the river was either dry or showed less than six inches of water at Riverside. The depth of the river during the balance of the year is not shown on this chart. These gauge readings also show that the dry or low periods did not occur during the same time in each year. Every month in the year is represented several times during the years covered by this chart, from which the conclusion is drawn that there were no regular periods when a given stage of water could be safely expected.

We refer to the readings on the Riverside gauge, not because of their bearing on the question of navigability at that point, but for the reason that they tend to show the natural volume of water in the channel above the points where the volume is increased by the additions made by the Illinois and Michigan Canal and the drainage channel, which added from 250,000 to 400,000 cubic feet of water per minute to the river below the point of connection."

In addition to the obstructions mentioned in the above quotation from the *Economy* case in the Supreme Court of Illinois, there is a solid masonry bridge at Dam No. 1 at Joliet owned by the State, in connection with which there is a very extensive power house. This dam extends entirely across the stream.

ERRORS RELIED ON.

1. Said Circuit Court of Appeals for the Seventh Circuit erred in affirming the decree of the United States District Court for the Eastern Division of the Northern District of Illinois of May 25, 1917.

3. Said Circuit Court of Appeals erred in holding that the DesPlaines River was a navigable stream in its natural condition.

5. Said Circuit Court of Appeals erred in holding that the DesPlaines River is a navigable water of the United States.

6. Said Circuit Court of Appeals erred in holding that from the latter part of the Seventeenth Century to the first part of the Nineteenth Century men engaged in the fur trade passed up and down the DesPlaines River in canoes and flat boats regularly and that such passage constituted commerce.

7. Said Circuit Court of Appeals erred in holding that supplies of various kinds needed by the settlers were transported over the DesPlaines River during the period preceding 1825 and that commerce existed upon said river until the year 1825.

8. Said Circuit Court of Appeals erred in not reversing the decree of said United States District Court, upon the ground that the DesPlaines River was not navigable in its natural condition.

10. Said Circuit Court of Appeals erred in not reversing the decree of the said United States District Court upon the ground that the DesPlaines River is not now navigable.

11. Said Circuit Court of Appeals erred in not reversing the decree of the said United States District

Court upon the ground that the DesPlaines River is not, in fact, capable of navigation for purposes of useful commerce, and that neither Section 8 of Article I of the Constitution of the United States, nor the act of Congress of March 3, 1899, nor any other act of Congress is applicable to said stream.

13. Said Circuit Court of Appeals erred in holding that the power of Congress to regulate Interstate Commerce does not depend upon the commerce clause of the United States Constitution, but may be sustained under the war power.

14. The said Circuit Court of Appeals erred in holding that the Act of March 3, 1899, applies to streams not navigable at the time of the passage of said act.

15. The said Circuit Court of Appeals erred in holding that the Act of March 3, 1899, applies to streams upon which no commerce existed at the time of the passage of said act.

16. The Act of March 3, 1899, as construed and applied by said Circuit Court of Appeals to the DesPlaines River would be unconstitutional.

17. Said Circuit Court of Appeals erred in holding that the ordinance of 1787 was preserved in the Constitution of Illinois.

18. Said Circuit Court of Appeals erred in holding that the ordinance of 1787 supersedes the common law doctrine of the necessity of use or custom to establish a public right of highway in streams.

19. Said Circuit Court of Appeals erred in holding that Section 9 of the act of Congress of May 18, 1796, entitled, "An act providing for the sale of lands of the United States in the territory northwest of the River Ohio and above the mouth of the Kentucky River," and

Section 6 of the act of Congress of March 26, 1904, are applicable to the DesPlaines River.

21. Said Circuit Court of Appeals erred in not holding that the commerce clause of the United States Constitution does not give to Congress power to control by legislation streams upon which no commerce exists.

22. Said Circuit Court of Appeals erred in not holding that the commerce clause of the United States Constitution does not give to Congress power to control by legislation streams upon which no commerce existed at the date of the passage of such legislation.

25. Said Circuit Court of Appeals erred in not holding that under the commerce clause of the United States Constitution Congress only has power to legislate with reference to streams navigable by the standards of navigation existing at the date of such legislation.

26. Said Circuit Court of Appeals erred in not holding that the Act of March 3, 1899, applies only to streams which were navigable by standards of navigation existing at the date of the passage of said act.

27. Said Circuit Court of Appeals erred in not reversing the decree of said United States District Court upon the ground that if the Act of March 3, 1899, or any other act of Congress mentioned in appellee's bill of complaint or relied upon by appellee, applies to DesPlaines River, said acts are null and void under the provision of the 5th Amendment of the Constitution of the United States forbidding the taking of property without due process of law, and the taking of private property for public uses without just compensation.

28. Said Circuit Court of Appeals erred in not reversing the decree of said United States District Court upon the ground that if said act of Congress of March 3, 1899, or any other of the acts of Congress mentioned in

appellee's bill of complaint or relied upon by appellee should be held to establish the character of said Des-Plaines River as navigable, then said acts, and each of them, are and is, unconstitutional notwithstanding the Ordinance of 1787, or any of the acts of Congress for the government of the Northwest Territory.

32. Said Circuit Court of Appeals erred in not following the decision of the Supreme Court of Illinois in the case of *People of the State of Illinois v. Economy Light & Power Company* and reversing the decree of said United States District Court upon the ground that said judgment of the Supreme Court of the State of Illinois and the decree of the Circuit Court of Grundy County thereby affirmed was a judgment *in rem* establishing the character of the DesPlaines River as a non-navigable stream notwithstanding the additional flow of water turned into the stream from the Sanitary District channel.

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ARGUMENT.

POINT I.

THE TITLE TO THE BED OF THE DESPLAINES RIVER AT THE POINT IN QUESTION, IS IN APPELLANT. THE CONTENTION OF THE UNITED STATES THAT IT HAS TITLE THERE-TO, IS WITHOUT ANY FOUNDATION IN LAW.

The larger part of the bill of complaint is given up to the assertion of title in the United States to the bed of the Des Plaines River. Although in the opinion of the District Court it was stated that this claim was untenable and it was not referred to in the opinion of the Court of Appeals, it remains in the case, and we cannot know that the United States, which solemnly asserted it in its bill, may not again urge the claim in this Court, and we therefore give it very brief consideration. The grounds upon which such title is claimed, appear in our statement of the pleadings, *supra*. In brief, it is rested upon a provision of the Act of Illinois Legislature of February 26, 1839, providing for the sale and disposal of canal lands, wherein, among other things, it was provided that

“Lands situated upon streams which have been meandered by the surveys of public lands by the United States, shall be considered as bounded by the lines of those surveys, and not by the stream”;

The bill alleges that this amounted to a rejection of so much of the land granted by the United States for canal purposes to the State of Illinois by the Act of March 2, 1827, as consisted of the beds of the streams in question.

In *State v. Economy Light & Power Co.*, 241 Ill., 290, the State of Illinois contended that because of this provision of the Act of 1839 the title to the bed of the Des

Plaines remained in it, but the court held that it was in the Economy Light & Power Company.

The United States insists in this cause that the Des Moines River is a navigable stream. If that were so, the title to its bed would have passed to the State of Illinois in 1818, when the State was erected out of the territory. It therefore could not have been part of the grant of March 2, 1827, and could not have been rejected by an Act of the Legislature of Illinois in 1839.

When the United States created states out of territories, all that it retained within the limits of those states were the public lands. Those lands which were under the navigable waters, were not public lands. They were lands not held by the United States in its proprietary, but in its sovereign, character, and when the state was erected and the sovereignty passed to the State, the title to the beds of navigable streams vested in the State. Whether it remained there, or whether it went into the riparian owner, depended upon the law of the State itself, and under the laws of Illinois, it passed into the riparian owner.

It is unnecessary to cite all the numerous cases which sustain this doctrine. Among the federal cases are

Pollard v. Hagen, 3 How., 212.

Scott v. Lattig, 227 U. S., 229, 242-243.

Donnelly v. United States, 228 U. S., 243, 260-261.

A leading case in Illinois is *Braxon v. Bressler*, 64 Ill., 188.

POINT II.

NAVIGABLE WATERS ARE THOSE WHICH, IN THEIR NATURAL AND ORDINARY CONDITION, ARE USED OR SUSCEPTIBLE OF BEING USED, AS HIGHWAYS OF COMMERCE, OVER WHICH TRADE AND TRAVEL ARE OR MAY BE CONDUCTED IN THE CUSTOMARY MODES OF TRADE AND TRAVEL ON WATER, AND THEY CONSTITUTE NAVIGABLE WATERS OF THE UNITED STATES WITHIN THE MEANING OF THE ACTS OF CONGRESS IN CONTRADISTINCTION FROM NAVIGABLE WATERS OF THE ^{several} STATES WHEN THEY FORM, BY THEMSELVES, OR BY UNITING WITH OTHER WATERS, A CONTINUED HIGHWAY OVER WHICH USEFUL COMMERCE IS, OR MAY BE, CARRIED ON WITH OTHER STATES OR FOREIGN COUNTRIES IN THE CUSTOMARY MODES IN WHICH SUCH COMMERCE IS CONDUCTED.

That the above is a correct definition of navigable waters of the United States, need not be supported by argument. It is in substance the definition laid down by this court in *The Daniel Ball*, 10 Wall., 557, and *The Montello*, 20 Wall., 430. It is a rule of general application throughout the United States, and all acts of Congress for the regulation of commerce, must be construed as applying only to waters of the character described. We state the fundamental rule, because from it as a starting point we expect to show that the decisions of the lower courts in the instant case proceed upon a definition of navigable streams, of the United States, which is unknown to the law.

POINT III.

THE ACT OF MARCH 3, 1899, UNDER WHICH RELIEF IS ASKED IS OF GENERAL APPLICATION TO NAVIGABLE WATERS THROUGHOUT THE UNITED STATES. THE COURT OF APPEALS BASED ITS JUDGMENT SOLELY ON A DEFINITION OF NAVIGABLE WATERS OF THE UNITED STATES WHICH THE LAW DOES NOT RECOGNIZE, AND WHICH ADMITTEDLY COULD APPLY ONLY WITHIN A LIMITED TERRITORY.

The decree of the trial court, affirmed by the Court of Appeals, contains no finding of fact except that the "said structure described in said bill of complaint as being constructed by said defendant in said river, is a structure erected in violation of the provisions of Section 9 of the Act of March 3, 1899."

This finding was, as the opinion in both courts show, based solely on the supposed effect of the Ordinance of 1787, and early Acts of Congress for the government of the Northwest Territory. The trial court did not, and upon this record could not, find that the Des Plaines River, from the time of the earliest settlement of the adjacent country, down to the entry of the decree, had ever been navigable for purposes of useful commerce. On the contrary, it expressly found that there was

"no evidence of actual navigation within the memory of living man, therefore, no present interference with navigation by placing obstruction in stream." (p. 3237.)

The Court of Appeals found that the record showed this to be true. (*Economy Light & Power Co. v. United States*, 256 Fed., 798.)

The Supreme Court of Illinois in the suit brought by the state against this appellant, decided that the river was not navigable, in a state of nature, and declared that there was not in the entire record a well-authenticated in-

stance in which a boat engaged in commerce navigated the waters of the Des Plaines River. (241 Ill., 309-336.)

We demonstrate in this brief (p. 108) that as to actual use, the records in both cases were in all substantial respects the same, except that there is in the present record additional evidence of attempted use of the river, which strongly confirms the conclusion to which the Illinois Supreme Court came.

The Court of Appeals said:

“The disposition of this case upon these facts may therefore well be narrowed down to the question: Was the Des Plaines River navigable in its natural condition.” (256 Fed. 800.)

and after consideration of that question and referring to cases which concerned “floatable” streams it expressed its conclusion as follows:

“Under these authorities it seems clear that the Des Plaines River, having been used as an interstate highway of commerce from 1673 to 1825 in the only kind of commerce then existing, is to be deemed of navigable capacity and a navigable stream within the Ordinance of 1787 and the acts of Congress of May 18, 1796, and March 26, 1804, by which Congress specifically took jurisdiction over navigable streams and declared that they should forever remain public highways.” (p. 804.)

Thus the Court of Appeals rested its decision, just as did the District Court, upon what it assumed to be the effect of the Ordinance of 1787 and of the statutes for the government of the Territory. We leave out of consideration, in this phase of the discussion, the question whether there is basis in the record for the words “having been used as an interstate highway of commerce from 1673 to 1825 in the only kind of commerce then existing.” That will be discussed later.

In the light of this opinion, and of the admitted facts, the inquiry on this branch of the case, narrows itself

own to this one question: Is the Act of March 3, 1899, forbidding obstructions of navigable streams, to be applied to all streams which, at the date of the Ordinance of 1787, and of the early Acts of Congress for the government of the Territory, were used to any extent whatever by explorers or fur traders? The opinion of the Court of Appeals as well as that of the District Court makes the one fact of such use, the touchstone in determining whether the Des Plaines River is a navigable stream within the meaning of the Act of 1899, regardless whether it has, or has not, from the earliest settlement of the country, afforded a highway for useful commerce, and of practical utility to the public as such.

We shall show that the Act of 1899 is not to be considered in connection with the Acts for the government of the Territory; that those Acts ceased to have any force and effect when the states were erected out of the Territory.

The early acts of Congress referred to are the following:

1. Act of Congress of May 18, 1796, U. S. St. L., Ch. 1, pp. 464-468, entitled "An Act providing for the sale of Lands of the United States in the territory northwest of the River Ohio, and above the mouth of the Kentucky River," Section 9 of which reads, in part, as follows:

"And be it further enacted, that all navigable rivers within the territory to be disposed of by virtue of this act, shall be deemed to be, and remain public highways."

2. The Act of Congress of March 26, 1804, 2 U. S. St. L., Ch. 35, pp. 277-283, entitled "An Act making provision for the disposal of public lands in the Indian Territory, and for other purposes," Section 6 of which reads, in part, as follows:

"That all navigable rivers, creeks and waters, within the Indian Territory, shall be deemed to be and remain public highways."

3. The Act of February 3, 1809, creating Illinois territory, and providing that the inhabitants thereof should enjoy all the "rights, privileges and advantages" of the Ordinance of 1787.

The Ordinance "for the government of the territory of the United States northwest of the River Ohio" provided by Article IV thereof, that

"The navigable waters leading into the Mississippi and Saint Lawrence, *and the carrying places between the same*, shall be common highways, and forever free, as well to the inhabitants of the said territory as to the citizens of the United States, and those of any other states that may be admitted into the Confederacy, without any tax, impost or duty therefor." (U. S. Rev. St., 2d Ed., 1878, p. 13.) (Italics ours.)

To these Acts and to the Ordinance the courts below went to find the definition of the words "navigable river, or other navigable water of the United States," as used in the Act of March 3, 1899. Appellee was compelled to rely on them, because it is not, and cannot be, contended that the river is, or ever has been, navigable for commerce as now carried on, or as it has ever been carried on, since the adjacent country was first inhabited by white men.

A very practical difficulty in using any such test of navigability as the lower courts applied, is this: It assumes that Congress, in passing the Act of 1899—an act of general application—contemplated that for its purposes the navigability of waters in what was formerly the Northwest Territory, to which alone that early legislation referred, must be determined by a definition not applicable anywhere outside of that territory. Manifestly, Congress did not intend that, in apply-

ing the Act of 1899, a stream in Illinois should be included in the term "navigable waters of the United States," and that a stream of precisely the same character and capacity in Massachusetts should not be so included, the distinction being made solely because of the Ordinance and the Acts for the government of the territory. But the courts below adopted, and the appellee asks this court to adopt, a rule of construction of the Act of 1899 which would prevent appellant from building a dam in the Des Plaines River, solely because the Des Plaines River happens to be in the former Northwest Territory, while if it had happened to be in Massachusetts, the factors here held to be controlling, viz: the early Acts and the Ordinance of 1787, could not have any bearing in determining whether it was a navigable river within the meaning of the Act of 1899.

Whether a stream is a navigable water of the United States is, and must be determined by the definition which the federal courts apply to all streams wherever situated within the borders of the United States. That definition was laid down in the early case of *The Daniel Ball*, 10 Wallace, 557, and has been reiterated many times since, as follows:

"Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress in contradistinction from the navigable waters of the states, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other states or foreign countries

in the customary modes in which such commerce is conducted by water."

In later cases it is held that the commerce must be "a useful commerce." (*The Montello*, 20 Wall., 430.)

We shall later show that under this rule, and the manner in which it has been applied, the Des Plaines River never was a navigable waterway in contemplation of law. We cite it here only to emphasize the point that the courts below brought the Des Plaines River within the scope of a law of general application, by adopting a definition of "navigable water" which is unknown to the law, and which could apply only in a limited territory.

POINT IV.

THE COURT OF APPEALS ERRED IN ARRIVING AT THE CONCLUSION THAT THE DESPLAINES WAS A NAVIGABLE STREAM BECAUSE, AS IT HELD, IT WAS OF NAVIGABLE CAPACITY UNDER THE ORDINANCE OF 1787, AND THE STATUTES FOR THE GOVERNMENT OF THE NORTHWEST TERRITORY.

a.

THE ORDINANCE OF 1787, AND THE STATUTES REFERRED TO CEASED TO HAVE ANY EFFECT AFTER THE ADMISSION OF THE STATE OF ILLINOIS IN 1818.

The Ordinance of 1787 and the early Acts of Congress which, according to the Court of Appeals and the District Court, had the effect of perpetually dedicating as highways of commerce, rivers etc., were intended to regulate the territories and were largely limitations of their powers while in a territorial condition. When the territories passed from that condition to statehood, taking their places as equals with the original States, the purposes to be effected no longer existed, because they became subject to all the laws governing the original

es, possessed of the same rights, and bound by no
r limitations.

a fact by the act of the State of Virginia ceding the
thwest Territory to the Union, the United States was
nd to admit states formed out of the Northwest Ter-
ry, "having the same rights of sovereignty, freedom
independence as the other states."

is plainly established by the decisions of the Supreme
rt of the United States and of the Supreme Court of
ois, that neither the Ordinance of 1787, nor the legis-
on for the government of the territories, on which the
er courts alone relied, has any force and effect in the
te of Illinois.

n *Van Brocklin v. State of Tennessee*, 117 U. S., 151,
the court said:

"The articles of confederation ceased to exist upon
the adoption of the Federal Constitution; and the
Ordinance of 1787, *like all the acts of Congress for
the government of the territories*, had no force in
any state after its admission into the Union, under
that Constitution." (Italics ours.)

n *Hawkins v. Bleakly*, 243 U. S., 210, objection was
de to a Workmen's Compensation Act on the ground
t it dispensed with trial by jury. It was argued first
t such right was secured by the Ordinance of 1787.
s court, in an opinion by Mr. Justice Pitney, pointed
that Iowa was not part of the Northwest Territory,
d therefore never subject to the Ordinance. Secondly,
as contended that the guaranties contained in the Or-
ance were extended to Iowa by certain early acts of
gress. As to this, this court said (page 217):

"This is easily disposed of. The Act of 1838 was
no more than a regulation of territory belonging to
the United States, subject to repeal like any such
regulation; and the act for admitting the state, so
far from perpetuating any particular institution pre-

viously established, admitted it 'on an equal footing with the original states in all respects whatsoever.' The regulation, although embracing provisions of the ordinance declared to be unalterable unless by common consent, had no further force in Iowa after its admission as a state and the adoption of a state constitution, than other acts of Congress for the government of the territory. All were superseded by the state constitution. *Permoli v. First Municipality*, 3 How. 589, 610; *Coyle v. Oklahoma*, 221 U. S., 559, 567, 570; *Cincinnati v. Louisville & Nashville R. R. Co.*, 223 U. S. 390, 401."

In *Escanaba Co. v. Chicago*, 107 U. S., 678, the Escanaba Co. sought to enjoin the closing of the bridges over the Chicago River between the hours of 6 and 7 in the morning and 5:30 and 6:30 in the evening, pursuant to city ordinance. To avoid the well established rule that, while instrumentalities of interstate commerce which are wholly intrastate are within the paramount authority of Congress, yet until Congress has acted they are within the control of the state, it was contended that Congress had acted, by the adoption of the Ordinance of 1787, Article 4 of which provided that:

"The navigable waters leading into the Mississippi and St. Lawrence and the carrying places between the same, shall be common highways, and forever free as well to the inhabitants of the said territory, as to the citizens of the United States."

But this Court held that neither the Ordinance of 1787 nor the early legislation for the government of the territories was in force in Illinois unless adopted by her after her admission to the Union.

The Court, by Mr. Justice Field, on page 688, said:

"The Ordinance was passed July 13, 1787, one year and nearly eight months before the Constitution took effect; and although it appears to have been treated afterwards as in force in the Territory, except as modified by Congress, and by the Act of May 7, 1800, c. 41, creating the Territory of Indiana, and

by the Act of February 3, 1908, c. 13, creating the Territory of Illinois, the rights and privileges granted by the ordinance are expressly secured to the inhabitants of those territories; and although the Act of April 18, 1818, c. 67, enabling the people of Illinois Territory to form a Constitution and State government, and the resolution of Congress of December 3, 1818, declaring the admission of the State into the Union, refer to the principles of the Ordinance according to which the Constitution was to be formed, its provisions could not control the authority and powers of the State after her admission. Whatever the limitation upon her powers as a government whilst in a territorial condition, whether from the Ordinance of 1787 or the legislation of Congress, it ceased to have any operative force, except as voluntarily adopted by her, after she became a State of the Union. On her admission she at once became entitled to and possessed of all the rights of dominion and sovereignty which belonged to the original States. She was admitted, and could be admitted, only on the same footing with them. The language of the resolution admitting her is 'on an equal footing with the original States *in all respects whatever*.' 3 Stat., 536. Equality of constitutional right and power is the condition of all the States of the Union, old and new." (Italics ours.)

In the instant case the Court of Appeals cited certain precedents to the Ordinance of 1787 in two Michigan cases, *Moore v. Sanborn*, 2 Mich., 519, and *Burroughs v. Whitwam*, 59 Mich., 226; 26 N. W., 491. But it is settled by the Supreme Court of the United States and the Supreme Court of Michigan that the Ordinance was superseded by the Constitution of that state. In *The La Caisse Bay Harbor Company v. City of Monroe*, Walker's Chancery, 155, where the provision as to navigable waters and carrying places was in question, it was held that the Ordinance of 1787 was "no part of the fundamental law of the state, since its admission into the Union. It was then superseded by the State Constitution, and such parts of

it as are not found in either the Federal or State Constitutions, were then annulled by mutual consent."

In *Sands v. Manistee River Improvement Company*, 123 U. S., 288, it was claimed that a statute of Michigan providing for certain tolls with respect to the Manistee River was unconstitutional as in violation of the Ordinance of 1787. This Court said:

"There was no contract in the fourth article of the Ordinance of 1787 respecting the freedom of the navigable waters of the territory northwest of the Ohio River emptying into the St. Lawrence, which bound the people of the territory, or of any portion of it, when subsequently formed into a State and admitted into the Union.

The Ordinance of 1787 was passed a year and some months before the Constitution of the United States went into operation. Its framers, and the Congress of the confederation which passed it, evidently considered that the principles and declaration of rights and privileges expressed in its articles would always be of binding obligation upon the people of the territory. The Ordinance in terms ordains and declares that its articles 'shall be considered as articles of compact between the original States and the people and States in the said territory, and forever remain unalterable unless by common consent.' And for many years after the adoption of the Constitution, its provisions were treated by various acts of Congress as in force, except as modified by such acts. In some of the acts organizing portions of the territory under separate territorial governments, it is declared that the rights and privileges granted by the Ordinance are secured to the inhabitants of those territories. *Yet from the very conditions on which the States formed out of that territory were admitted into the Union, the provisions of the Ordinance became inoperative except as adopted by them.* All the States thus formed were in the language of the resolutions or acts of Congress, 'admitted into the Union on an equal footing with the original States in all respects whatever.' Michigan, on her admission, became, therefore, entitled to and pos-

sessed of all the rights of sovereignty and dominion which belonged to the original States, and could at any time afterwards exercise full control over its navigable waters except as restrained by the Constitution of the United States and laws of Congress passed in pursuance thereof." (Pages 295-6; italics ours.)

b.

THE COURT OF APPEALS WAS IN ERROR IN STATING IN ITS OPINION THAT THE "SAME PRINCIPLE" AS THAT CONTAINED IN ORDINANCE WAS PRESERVED IN THE ILLINOIS CONSTITUTION.

The Court said (256 Fed., 800):

"It is immaterial to inquire whether the Ordinance is still in force, or was superseded by the Illinois Enabling Act, or the act of admission, because the same principle is preserved in those statutes, and in the Illinois Constitution."

By the words, "those statutes," the Court refers to the Acts for the government of the Territory, which, as we have pointed out, this Court in the *Van Brocklin* case, *supra*, said "had no force in any state after its admission into the Union under the Constitution."

The principle was not "preserved * * * in the Illinois Constitution." Neither in the Constitution of 1818, or in any succeeding Constitution is the provision of the Ordinance in regard to navigable waters, or any of the early statutes in question, adopted or incorporated.

It has been expressly held both by this Court and by the Supreme Court of Illinois, that the provision in question, whether in the Ordinance or the legislation referred to, did not have any effect after the Constitution of 1818 was adopted. See

Escanaba Co. v. Chicago, supra.

In *Dixon v. The People*, 168 Ill., 179, and *People v. Thompson*, 155 Ill., 451, it is held that the Ordinance has no force in Illinois.

The Court of Appeals in the instant case quotes from the opinion of this court in *The Montello*, 20 Wall., 430, the following:

“To preserve the natural character of all the rivers leading into the Mississippi and St. Lawrence and to prevent a monopoly of their waters, was the purpose of the Ordinance of 1787 declaring them to be free to the public.”

This Court in that case, was considering the regulation of steamboat navigation on the Fox River, which, with the Wisconsin River, from earliest times were navigable rivers in the true sense. We deal with that case more fully in another part of this brief. (*Post*, p. 61.) Here we point out that the situation in Wisconsin was radically different from that in Illinois.

In the Act of Congress of August 6, 1846, to enable the people of Wisconsin territory to form a constitution and a state government and for the admission of such State into the Union, it was provided that:

“The said State of Wisconsin shall have concurrent jurisdiction on the Mississippi, and all other rivers bordering on the said State of Wisconsin, so far as the same shall form a common boundary to said state and any other state or states now or hereafter to be formed or bounded by the same; and said rivers and waters, and the navigable waters leading into the same, shall be common highways, and forever free, as well to the inhabitants of said state as to all other citizens of the United States, without any tax, duty, impost or toll therefor.”

No such provision was contained in the Act enabling the formation of the State of Illinois.

And the Constitution of Wisconsin, adopted pursuant to this Act, contained the following as Section 1, Article 9:

"The River Mississippi and the navigable waters leading into the Mississippi and St. Lawrence, and the carrying places between the same, shall be common highways and forever free, as well to the inhabitants of the state as to the citizens of the United States, without any tax, impost or duty therefor.

In *Wisconsin v. Cunningham*, Wis., 15 L. R., 561, it was held that the Ordinance and the organic act which was adapted only to the territorial condition of Wisconsin, became obsolete and ceased to have any operative force, except as voluntarily adopted by her after she became a state of the Union.

But even where provisions of the Ordinance have been adopted as part of the organic law of the state, it has never been held that any Act of Congress for the regulation of commerce applied to streams which were not in fact navigable for the purposes of useful commerce, at the time of the passage of such Act, and in *State v. Carpenter*, 68 Wis., 165, it was held that, notwithstanding the incorporation of the Ordinance into the Constitution of Wisconsin, an injunction would not issue to prevent the erection of a structure in a river which had ceased to be of any practical use for commerce. We shall refer to this case at greater length hereafter.

Counsel argued in the court below that Congress, having determined to preserve the public character of the navigable rivers in the Northwest Territory, it was not within the competency of the State to abrogate its action. No such question is presented in the record. The State has not attempted to abrogate the action of Congress. Those Acts ceased to have any effect by the mutual consent of the people of Illinois and the United States when the State was organized.

Counsel cited in the lower court, in this connection, *United States v. Sandoval*, 231 U. S., 28, 38. *Coyle v. Oklahoma*, 221 U. S., 559, 574. Neither case has any

bearing. The *Sandoval* case was a proceeding by indictment for introducing liquor into the Indian country, contrary to the Act of January 30, 1897; that Act was not one for the government of Indians in any particular Territory, but it applied to the Indians, who were the wards of the Nation, upon Indian lands wherever situated. Nor question of equality between a newly admitted State and an old State, could arise under it. The sole question, as stated by Mr. Justice Van Deventer, was (p. 38)

“whether the status of the Pueblo Indians and their lands is such that Congress competently can prohibit the introduction of intoxicating liquor into those lands notwithstanding the admission of New Mexico to statehood.”

The Enabling Act had provided that the terms “Indian” and “Indian Countries” should include the Pueblo Indians in New Mexico. The court rehearsed the history and condition of those Indians and their title to the lands, and came to the conclusion that the status of the Pueblo Indians, and their land, was such as to bring them within the power of Congress to exercise jurisdiction over the Indians and their affairs. It was pointed out by the court that this power was rightfully exercised by the United States “over all dependent Indian communities within its borders, *whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State.*” (p. 46.) And further:

“Being a legitimate exercise of that power, the legislation in question does not encroach upon the police power of the State or disturb the principle of equality among the States.” (p. 49.)

The case of *Coyle v. Oklahoma*, *supra*, concerned the right of the State to remove its capital. The opinion reviews the authorities upon which we rely and sustains the principle that “each State must be admitted upon an equality with all other States.”

POINT V.

THE COURT OF APPEALS FAILED TO DISTINGUISH BETWEEN STREAMS HELD TO BE "FLOATABLE" UNDER THE LAWS OF CERTAIN OF THE STATES, AND NAVIGABLE WATERS OF THE UNITED STATES, SUBJECT TO THE CONTROL OF CONGRESS UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION, AND IN CONSEQUENCE ADOPTED AN ERRONEOUS DEFINITION OF "NAVIGABLE WATERS OF THE UNITED STATES."

The opinion of the Court of Appeals discloses a fundamental misconception of what Mr. Justice Miller, in considering what are navigable waterways of the United States, referred to as "the great point of the navigability of streams of the United States concerning interstate and international commerce." This misconception is markedly evidenced by the following reference by the Court of Appeals to *Brown v. Chadbourne*, 31 Me., 9:

"The statement, 'A way over which one has a right to pass, may be periodically covered with water,' gives rise to the suggestion that a river in the latitude of the Des Plaines is ordinarily frozen over during some of the winter months, and in a new country where the roads, if any, are very poor and inadequate, such a river would afford an excellent highway at least in many places, for teams drawing sleighs." (256 Fed., 803.)

It appears from the opinion as a whole that a stream over which sleighs could be drawn in winter, and down which logs could be floated in other parts of the year, would in the judgment of the Court of Appeals, be a navigable waterway of the United States, provided always that it happened to be in what was formerly the Northwest Territory.

The necessary result of the application made by the court of the Ordinance of 1787 and the early statutes is that every stream, over which, prior to 1787 men passed

in skiffs or canoes, or indeed down which logs could be floated, within the territory to which the Ordinance referred, must for all time be deemed navigable waters of the United States within the meaning of the Commerce clause of the Constitution and subject to all statutes for the control of interstate commerce which might be enacted thereunder, regardless of whether or not such streams were susceptible of valuable use for commerce.

The Court of Appeals saw that this was the logical and necessary conclusion of its reasoning and in paragraphs 5, 6, of its opinion (256 Fed., 802) it collected together a number of cases from the courts of various States to sustain this proposition. Most of the cases have to do with the question of the right to float logs in certain small streams. Such cases are:

Gaston v. Mace, 33 W. Va., 14; 5 L. R. A., 392.

Stratton v. Currier, 81 Me. (incorrectly cited as 81 Mo.), 497.

Moore v. Sandborne, 2 Mich., 519.

Wadsworth, Adm'r., v. Smith, 11 Me., 278.

Brown v. Chadbourne, 31 Me., 9.

Lewis v. Coffey County, 77 Ala., 190.

Morrison Bros. & Co. v. Coleman, 87 Ala., 655.

Carter v. Thurston, 58 N. H., 104.

Kamm v. Normand, 50 Or., 9.

The Court overlooked the well recognized fact that streams may be deemed navigable or floatable under local laws for certain purposes and yet not be navigable waterways of the United States.

Mr. Justice Miller, in *Duluth Lumber Co. v. St. Louis Boom & Improvement Co.* (17 Fed., 419), distinctly emphasizes the point we are now making. That case concerned the St. Louis River, a much more important stream than the Desplaines, for it was actually navi-

gated by small water craft, even including steamboats, at the time the case arose. Mr. Justice Miller said:

"It is proper to say that many statutes of many states for the very purpose of preserving these small streams for the use of sawlogs and various kinds of small water craft, declare such streams navigable. There is hardly a stream in the western country that can float a log that has not, by statute of the state, been declared to be navigable to prevent people from putting dams across it; *but that has nothing to do with the great point of the navigability of streams of the United States concerning interstate navigation or international navigation.* Those are statutes made by the states for their own uses, and they can declare, and often do declare, that a little branch is a navigable stream. That does not make it so within the meaning of any constitutional provision, treaty, or ordinance of the United States." (pg. 424, italics ours.) (See, also, *State v. Carpenter*, 68 Wisc. 165.)

A reading of the opinions in certain of the cases cited by the Court of Appeals in the instant case shows that the judges who gave those opinions did not overlook the distinction in question. They did not intend to hold, or understand that they were holding, that "floatable streams" were "navigable waters of the United States." Thus, in the first case cited by the Court of Appeals in this connection, *Gaston v. Mace*, *supra*, the court pointed out that the stream there in question, though floatable, was not a navigable stream capable of being navigated by boats or lighters and on which commerce might be carried on.

The court said (5 L. R. A., 396):

"In the United States there are three classes of navigable streams: (1) tidal streams that are held navigable in law whether navigable in fact or not; (2) those that, although nontidal, are yet navigable in fact for boats or lighters, and susceptible for

valuable use for commercial purposes; (3) the streams which, though not navigable for boats or lighters, are floatable or capable of valuable use in bearing logs, or the products of mines, forests or the tillage of the country they traverse, to mills or markets. * * *

The very definition of the third class of navigable streams shows that these streams would not be included in the common-law definition of a navigable stream,—that is one in which the tide ebbs and flows,—nor could it come within the civil law definition of a navigable stream, which is capable of being navigated by boats or lighters, and on which commerce may be carried on.

The third class of navigable streams are generally called floatable streams; and though the public has the right to use them as a public highway by floating logs and other products of forest, mines and tillage down these streams to mills and market, yet the riparian owners along such streams own the bed of them as well as their banks, differing in this respect from other navigable streams." (Italics ours.)

Likewise, in *Heyward v. Farmers Mining Company* (42 S. C. 138, 19 S. E., 963), also referred to by the Court of Appeals, the court distinguished between navigable streams under the control of the states and such navigable waters of the United States as were subject to the laws of interstate commerce. In that case, the court, in holding that the trial court was in error in enumerating certain conditions as necessary to the navigability of a stream, one of the conditions being that it must make connections with other highways, said:

"This test has only been applied in cases where the question was whether a stream was a navigable water of the United States. There are certain conditions to be considered in determining the navigability of waters of the United States, so as to subject them to the laws of interstate commerce, which do not apply to navigable streams under the control of the state. Among these conditions is that mentioned by the circuit judge." (p. 152.)

The Court of Appeals, in applying the test of the capacity of a stream for floatage of lumber, cited *Moore v. Sandborne* (2 Mich., 520), which was an action to recover damages for obstructing Pine River, a small stream of limited capacity for floating; but the Supreme Court of Michigan recognized the distinction between such floatable streams and navigable waterways of the United States in *City of Grand Rapids v. Powers* (50 N. W., 661; 89 Mich., 94, page 111). The court said:

"Whatever may be the power of the legislature in waters 'strictly navigable' to fix an arbitrary line beyond which riparian owners cannot go, or to delegate to a municipality that power, I am satisfied that no such right exists in the waters of Grand River at the rapids, or certainly in that part of the waters which are *not now navigable* for any purpose. The rights of the riparian owner, under our laws, is subject only to the public use for the purposes of navigation; and there is a manifest difference between public streams that can be used successfully for the running of boats and vessels for the purpose of commerce, and those which are only capable of being used for the floatage of lumber and logs in rafts or single pieces. The riparian owners are entitled to the beneficial and sole use of the latter streams, except for floatage; *and when such streams have become unfitted for valuable public use, and have actually ceased to be used for public highways, there is no more reason for holding them to be public than in the case of a land highway which has been abandoned and is useless.*" (Italics ours.)

This right of floatage, which has nothing to do with navigation, under the laws of the United States, is protected only in states where there are interests which require such protection. In Illinois it has never been recognized. Thus in *Hubbard v. Bell* (54 Ill., 110), it was held that the fact that a river was capable of floating logs at certain seasons did not render it subject to the *jus publicum* even for that purpose. The court,

referring to the contention of counsel that the stream in question was subject to such use, said:

"The principle is distinctly asserted that the public have the right to the free use of all streams which are susceptible of any valuable floatage. * * *

However necessary it may be in the great lumbering States of Maine and Michigan that private rights should yield to prevailing interest, no such interest exists in this state, and we shall be careful that the rights of its citizens shall not be wrongfully invaded upon such pretenses as are set forth in this record, and sustained by such considerations as influenced the judgments of the courts whose opinions we have considered." (p. 118.)

In *Schulte v. Warren* (218 Ill., 108), the court referred to *Hubbard v. Bell*, saying:

"In this state the public have an easement for the purpose of navigation in waters which are navigable in fact, regardless of the ownership of the soil, and the question whether these waters are navigable depends upon the question whether they are of sufficient depth to afford a channel for useful commerce. In some states where lumber interest has been regarded of first importance the courts have held that waters which are capable of floating logs are navigable; but in *Hubbard v. Bell* (54 Ill. 110), this court declined to adopt this rule and adhered to the doctrine that *navigable waters must be capable of practical general uses*. The rule stated by Lord Hale in his treatise *De Jure Maris* that the stream to be navigable must furnish 'a common passage for the King's people' must be 'of common or public use for the carriage of boats and lighters,' must be capable of bearing up and floating vessels for the transportation of property conducted by the agency of man, was approved. (*Joliet and Chicago Railroad Co. v. Healy*, 94 Ill. 416.)

A stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for rowboats or small launches answering practically the same purpose, or that hunters and fishermen pass over the water with boats ordinarily used for that purpose, does not render the waters navigable." (Page 119; italics ours.)

POINT VI.

THE FOX RIVER REFERRED TO IN THE MONTELLO CASE, IN ITS NATURAL CONDITION AND AFTER THE SETTLEMENT OF THE COUNTRY, WAS LARGELY USED FOR COMMERCE. THE DESPLAINES WAS NOT TO ANY EXTENT WHATEVER. THE PHYSICAL CHARACTERISTICS OF THE FOX AS COMPARED TO THOSE OF THE DESPLAINES EXPLAIN THE MARKED DIFFERENCE IN THE HISTORY OF THE USE OF THE TWO STREAMS.

The Court of Appeals referred to *The Montello*, 20 Wall., 440, and that case has largely been relied upon both by the appellee and the State of Illinois in the litigation concerning the proposed dam. The Fox River there in question and the DesPlaines have nothing in common in physical characteristics and little in historical conditions. From the earliest times the former river was a channel for useful commerce and the *Montello* suit itself arose out of the question whether steamboats navigating its waters were subject to governmental regulations. Not even a gasoline launch has ever navigated the waters of the DesPlaines.

In *The Montello* the court said (20 Wall., 440):

“In more modern times, and since the settlement of the country, and before the improvements resulting in an unbroken navigation were undertaken, a large interstate commerce has been successfully carried on through this channel. This was done by means of Durham boats, which were vessels from seventy to one hundred feet in length, with twelve feet beam, and drew when loaded two to two and one-half feet of water. These boats, propelled by animal power, were able to navigate the entire length of Fox River, with the aid of a few portages, and would readily carry a very considerable tonnage.”

In the case of the DesPlaines the record shows not one instance since the days of settlement, of the use of the

river for any commerce. The use of the one, and the failure to use the other, are easily understood when the physical characteristics of the two are compared. A Government report shows that the Fox River up to the portage to the Wisconsin, is $154\frac{1}{2}$ miles in length, fifteen miles being through Lake Winnebago, which has a depth of twenty feet; that the river itself, except at the point where the rapids, hereinafter to be mentioned, occur, for the most part *had no perceptible current, the slope being slight, and except at one or two places where the bottom was soft sand, the general depth of the upper river, at an ordinary height of water, was between four and five feet.* The obstructions in its natural state were rapids, falling 170 feet in 28 miles, and 88 feet of these were in two falls, and, in the natural condition of the river the only portages required, being around these falls, *aggregated less than a mile.* The depth of the lower Fox—and it was in this portion that the rapids appeared—was from eight to ten feet, and the variation in depths during the year, was not more than three or four feet, so that there was at least a depth of from four to six feet at any stage of the water. (Abst., 3035, 3040.)

The DesPlaines River is over 100 miles in length. No claim is made that the upper river is, or ever has been, navigable. We have described the lower portion in the statement of facts. It is a series of rapids and pools. The Supreme Court of Illinois in *State v. Economy Light & Power Co.*, said:

“The bottom of the river from Lockport to the dam in question, with the exception of that portion under Lake Joliet, is covered with a large number of boulders. The bottom of Lake Joliet is soft. The evidence shows that these boulders are of various sizes, some of them between two and three feet in diameter. Some of them are covered entirely with water, while others project slightly above the sur-

face of the water. It is also shown that in going down the river in a skiff or any kind of boat there is great danger of coming in contact with these boulders. The current is so strong that it is not possible to row a boat upstream over these rapids. In addition to the natural barriers already spoken of, the evidence shows that the stream is tortuous and the channel very narrow at places. The slopes in the river already given do not represent the greatest fall that can be found in this stretch. The evidence shows that there is near the head of Treat's Island a fall of seventeen feet to the mile, and near the foot the slope is eighteen feet to the mile, and in the right-hand channel opposite Treat's Island there is a space of five hundred feet in which the fall is fifty feet to the mile, and if shorter distances are taken even greater slopes than these will be found to exist. At one place near the mouth of the river there is a fall for three or four hundred feet of twenty feet to the mile."

The Supreme Court of Illinois also found from the gauge readings at Riverside that there were from 24 days in 1890 to 213 days in 1895 during which the river was dry at the Riverside gauge, Riverside being 28 miles above Joliet. And further, "that there were many days when there was less than six inches of water at Riverside, so that the dry days and the days showing less than six inches of water were from 120 days in 1888 to 300 in 1901.

We shall have occasion later to refer to the significance of the Riverside gauge readings.

The distinction made by this court in *United States v. Rio Grande Dam and Irrigation*, 174 W. S., 690, between the Fox River and the Rio Grande, is even more applicable to the DesPlaines as compared to the Fox. This court said (p. 699):

"Obviously, the Rio Grande within the limits of New Mexico is not a stream over which in its ordinary condition trade and travel can be conducted in

the customary modes of trade and travel on water. Its use for any purposes of transportation has been and is exceptional, and only in times of temporary high water. The ordinary flow of water is insufficient. *It is not like the Fox River, which was considered in The Montello, in which was an abundant flow of water and a general capacity for navigation along its entire length, and although it was obstructed at certain places by rapids and rocks, yet these difficulties could be overcome by canals and locks, and when so overcome would leave the stream in its ordinary condition, susceptible of use for general navigation purposes.* We are not, therefore, disposed to question the conclusion reached by the trial court and the Supreme Court of the Territory, that the Rio Grande within the limits of New Mexico is not navigable." (Italics ours.)

POINT VII.

THE RIGHT OF CONGRESS TO LEGISLATE AT ALL ARISES UNDER THE COMMERCE CLAUSE OF THE CONSTITUTION, WHICH DOES NOT APPLY TO SUCH STREAMS AS THE DESPLAINES. IF THE ACT OF 1899 APPLIES TO THAT STREAM IT IS VOID. THE COURT OF APPEALS ERRONEOUSLY HELD THAT THE RIGHT TO SO LEGISLATE MIGHT ARISE UNDER THE WAR POWERS OF CONGRESS.

The answer of appellant as amended avers that the purpose of the Act of March 3, 1899, is to protect existing commerce, and that there is no commerce on the Des-Plaines River to be protected, and that the Act does not apply to it (p. 3235); and that the river is not in fact capable of navigation for purposes of useful commerce, and that neither Section 8, Article 1 of the Constitution of the United States, nor the Act of Congress of March 3, 1899, or any other Act of Congress, is applicable to such stream. It is further averred that if the Act of 1899, or any Act of Congress mentioned in the bill, or relied upon, should be held to establish the character of

DesPlaines as navigable, then said Acts, and each of them are, and is, unconstitutional. It further insists that the Act of 1899, or any other Act of Congress, applies to the DesPlaines, the same are null and void under the provisions of the Fifth Amendment to the Constitution of the United States, forbidding the taking of property without due process of law, and the taking of private property for public use without just compensation (pp. 5-3236).

The Court of Appeals, in the opinion in the instant case, in effect denies that the right of Congress to legislate at all arises only under the Commerce clause of the Constitution. In its opinion (256 Fed., 799) appears the following:

“It is argued that the Act of 1899 was passed under the constitutional power to regulate interstate commerce and as no such commerce on the DesPlaines then existed, the statute can have no application, and that if the statute be construed to reach beyond this, it was to that extent beyond the legislative power. *Even so it might be sustained under the war power.* We have lately had a significant reminder of the inadequacy of railroad transportation in time of stress.” (Italics ours.)

There is little that Congress may not do in time of war, under its war powers. The implication in the portion of the opinion just quoted, that in time of peace its right to regulate railroads, rivers and other means of interstate commerce, may be referred to, and based on these powers, is startling and has no warrant in any decision which we have been able to find. If it were sound doctrine the safeguards of property and human liberty, which the Constitution contains, would largely be impaired.

That the power of Congress to enact such legislation as the Act of March 3, 1899, arises only out of the Commerce

clause of the Constitution has been repeatedly stated by this Court. Chief Justice Marshall in *Gibbons v. Ogden*, 9 Wheat., 1 (p. 190), said:

“If commerce does not include navigation the government of the Union has no direct power over that subject.”

In *Monongahela Navigation Co. v. United States*, 148 U. S., 312, 335, Brewer, J., said:

“Upon what does the right of Congress to interfere in the matter rest? Simply upon the power to regulate commerce.”

To the same effect is *United States v. Cress*, 243 U. S., 316.

This Court has pointed out that

“what the Constitution and the Acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.”

Leovy v. United States, 177 U. S., 621-633.

It seems a necessary conclusion that Congress in passing any Act under this power to regulate commerce, must have had in mind, and its constitutional power must be limited to, commerce as carried on at the time of the passage of the Act, and that any such Act must be construed as applying only to waters of the United States, navigable in fact for commerce as then conducted.

The trial court and the Court of Appeals in the instant case determined that the Act of March 3, 1899, applies to the DesPlaines River, by a test which as we have shown wholly disregards this view and which attributes to Congress a power which it does not possess. Under the “practical construction” of the Constitution which this Court held to be the proper one, Con-

gress had power by the Act of 1899, to protect and regulate commerce as then existing, upon streams then in fact navigable. But it had no power to measure navigability by going back a century and taking in every stream, brook, or creek over which early fur traders, explorers, or adventurers, driven by dire necessity, managed to force their canoes or other frail craft. The lower courts, however, predicated their decisions not alone upon the existence of such power in Congress, but upon a curious extension of it. According to their reasoning, Congress had the power to bring within the scope and application of the Act of March 3, 1899, streams in the Northwest Territory, while it could not have applied it to streams of the same character in the original states. We submit that if Congress, in passing the Act of 1899, intended as the test of navigability of streams in the old Northwest Territory, the use which was ^{made} of them in 1787, or 1804, or 1809, and for streams outside of that Territory, the test of navigability laid down by the Supreme Court in the *Montello case*, 20 Wall., 430—

“to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture”—

then the Act, as applied to the former streams at least, would have been void. But it would be extremely unfair to Congress to attribute to it any such intention.

The Supreme Court in the *Leovy case*, *supra*, gave its understanding of what Congress meant, when, in referring to the Act of 1890, it said:

“It is a safe inference from these and other cases to the same effect which might be cited, that the term ‘navigable waters of the United States’ has reference to commerce of a substantial and permanent character to be conducted thereon.” (p. 632.)

We further contend that even though the DesPlaines River had been of navigable capacity, yet because there

is not, and has not been, within the memory of any living witness, nor within the historical period of the settlement of the country, any commerce upon this river, Congress was without power to pass any law which would require the riparian owner to procure a permit to erect a dam in a stream, to the bed of which he held title.

A very important and disastrous result of any such construction of the Commerce clause as the Court of Appeals has given it in the instant case, and of such Acts as that of March 3, 1899, is indicated in the opinion of the Supreme Court of Michigan, in *Valentine v. Berrien Springs Water Company*, 128 Mich., 280; 87 N. W., 370, 374, where the court, in discussing the question whether or not dams and other obstructions might be placed in the St. Joseph River, said:

“The future prosperity of many places in the State is largely dependent upon the use which may be made of rivers of this character. If dams cannot be built and power (the cheapest in the world) thus furnished, water supplied, and the navigation of rivers improved, these cities, villages and country towns will lose the greatest benefits which nature has placed within their reach.”

The title to the bed of the stream was in appellant, regardless of whether it was or was not a navigable stream.

State v. Economy Light & Power Co., *supra*.

Schulte v. Warren, 218 Ill., 108.

Lorman v. Benson, 8 Mich., 18.

City of Grand Rapids v. Powers (Mich.), 50 N.

W., 661, and cases therein cited.

Having title, the owner may do with it as he chooses, provided he does not obstruct navigation, or damage other riparian owners along the stream above or below him.

Grand Rapids v. Powers, *supra*.

City of Kewanee v. Otley, 204 Ill., 402.

Yates v. Milwaukee, 10 Wall., 497.

That property right can only be invaded under the Commerce clause in so far as may be essential to protect an existing easement for navigation.

So far as the United States is concerned, the riparian owner holds his title subject only to the Constitutional power of the Government to regulate, and prevent the obstruction of commerce. It possesses no other power to interfere. But regulation, or obstruction, of commerce presupposes the existence of commerce.

In *United States v. Rio Grande Irrigation Co.*, 174 U. S., 690, at p. 709, in discussing the right of the Attorney General to proceed under the Act of 1890, which was a similar statute, the Supreme Court said:

“The question is always one of fact, whether such appropriation substantially interferes with the navigable capacity, within the limits where navigation is a recognized fact.”

No case will be found where the right of Congress to interfere has been sustained except to protect existing commerce. Mr. Taft, as Secretary of War, in regard to this very dam, said if the DesPlaines River had been navigable, and application had been made for approval of the plans of the dam, if the Department concluded that it would not interfere with navigation, then it was not within the power of the Department to withhold a permit. This could only mean that under such circumstances, there would have been no Constitutional power in the government to prevent the obstruction. (Abst., 1937.)

In *Leovy v. United States*, 177 U. S., 621, 637, this Court said that because

“Red Pass, in the condition it was at the time this dam was built, was not shown by adequate evidence to have been a navigable water of the United States, actually used in interstate commerce”

the court should have charged the jury in favor of the defendant.

In that opinion (page 633) the Supreme Court criticized the instructions of the trial court, because under them all streams upon which a skiff or small lugger could float, would constitute navigable water of the United States, and clearly intimated that under such a construction, Congress would have had no Constitutional power to enact such a statute. It said:

"If such were the necessary construction of the statutes here involved, their validity might well be questioned."

In the court below counsel argued that the opinion of the Supreme Court in the *Leovy* case, had no bearing on the instant case, because of a difference in the Acts under which the two proceedings were brought. They pointed out that the indictment in the former case was under the Act of September 13, 1890, prohibiting the obstruction of commerce, while the instant case was brought under the Act of March 3, 1899, to prevent the placing of an obstruction in navigable waters.

Their contention seemed to be that the *Leovy* case has no weight in determining the present issue, because the Act of March 3, 1899 does not refer to the obstruction of commerce, but prohibits the building of obstructions in navigable rivers. Counsel ignored entirely the reasoning by which this Court arrived at its conclusion. They further ignored the fact that in that case the Government "*contended that the policy of Congress in respect to the authority of the Secretary of War in the matter of obstruction to navigation, has been greatly changed and modified by the Act of March 3, 1899*" (177 U. S., 637), and that this Court said that in the view that it took of the case it was not called upon to express an opinion on that question. The view, there referred to, appears on

pages 632 and 633 of the opinion. This Court's remarks concerned the proper definition of the words "navigable water of the United States," and they are equally applicable to a proceeding under either Act. The instruction which the trial judge gave was quite in line with the contentions of the counsel for the Government in the instant case, and as to it this Court said:

"If these instructions were correct, then there is scarcely a creek or stream in the entire country which is not a navigable water of the United States. Nearly all the streams on which a skiff or small lugger can float discharge themselves into other streams or waters flowing into a river which traverses more than one state, and the mere capacity to pass in a boat of any size, however small, from one stream or rivulet to another, the jury is informed, is sufficient to constitute a navigable water of the United States.

Such a view would extend the paramount jurisdiction of the United States over all the flowing waters in the states, and would subject the officers and agents of a state, engaged in constructing levees, to restrain overflowing rivers within their banks, or in regulating the channels of small streams for the purposes of internal commerce, to fine and imprisonment, unless permission be first obtained from the Secretary of War. If such were the necessary construction of the statutes here involved, their validity might well be questioned. But we do not so understand the legislation of Congress. *When it is remembered that the source of the power of the general government to act at all in this matter arises out of its power to regulate commerce with foreign countries and among the states, it is obvious that what the Constitution and the acts of Congress have in view is the promotion and protection of commerce in its international and interstate aspect, and a practical construction must be put on these enactments as intended for such large and important purposes.*

We also think that these instructions are open to the further criticism that they contain no reference to the nature or extent of the traffic or trade carried on in Red Pass before the erection of the dam. In-

deed, the charge necessarily implies that the defendant was guilty if there was merely a capacity for passing from Red Pass into the Mississippi River on any sort of a boat. Very different was the view expressed by Chief Justice Shaw when he said it is not 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but in order to give it the character of a navigable stream it must be generally and commonly useful to some purpose of trade or agriculture. (21 Pick., 344.)' (p. 633; italics ours.

In the early days the Great Miami River was frequently used by explorers and fur traders. In *Koehn v. City of Dayton*, 77 Ohio St., 341, 119 N. E., 651, the plaintiff sought to enjoin the City of Dayton from constructing a dam in the bed of that river claiming that it was a navigable stream. In the Court of Appeals of Montgomery County an opinion was rendered March 14, 1917, certified copy of which we have, in which it was held that the Great Miami River at Dayton was not a navigable river, saying:

"We find from an examination of the authorities that the question of the navigability of a stream is one of fact to be determined from the evidence describing its condition at the time of the inquiry and during a reasonable period of time prior to the inquiry."

The Supreme Court of Ohio affirmed the opinion holding that the Great Miami was not a navigable stream at the point stated and that the construction of the dam would not in anywise impede or impair navigation.

POINT VIII.

THE COMMERCE CLAUSE OF THE CONSTITUTION DOES NOT APPLY TO A STREAM WHICH IS WHOLLY WITHIN THE LIMITS OF ONE STATE AND WHICH DOES NOT, BY A NAVIGABLE CHANNEL, CONNECT WITH WATERS MAKING IT AVAILABLE FOR INTERSTATE COMMERCE.

In *Veazie v. Moor*, 14 How., 568, the Supreme Court considered the validity of an act of the Legislature of the State of Maine giving to one Moor the exclusive right to run steamboats on the Penobscot River. This was attacked as in violation of the Commerce clause of the Constitution. The Penobscot is entirely within the limits of Maine, and eight miles from its mouth it passed over a fall and was crossed by dams, and for that space, was not, and never had been, navigable. A canal of eight miles, or the improvement of the river, would have opened the Penobscot to the sea, but it was held by the Supreme Court that the Penobscot was not a navigable stream, and that the Commerce clause of the Constitution did not apply to a river of that kind.

When the *Montello* case, 11 Wall., 411, was first before the Supreme Court, it was sent back, because, though it appeared that the Fox River was used by steamboats for transporting products of Wisconsin, it did not appear that it was navigable to Lake Michigan, and until that was shown, it could not be declared to be a navigable water of the United States.

While the DesPlaines has its source in Wisconsin, no serious claim is made, and no evidence was introduced to show, that in that State it ever had been, or could be used, even by canoes. Even if the DesPlaines were navigable from Lockport to its mouth it would not be a navigable water of the United States, for, as we shall show, the upper Illinois is not, and never was, navigable.

POINT IX.

"WHEREVER IN THE COURSE OF A STREAM, IT CEASES TO BE A PUBLIC HIGHWAY FOR COMMERCE BETWEEN TWO AND OTHER STATES AT THAT POINT ITS NATIONAL CHARACTER TERMINATES AND ABOVE THAT IT IS WITHIN THE EXCLUSIVE JURISDICTION OF THE STATE."

The language of this heading is quoted from *Neaderhouser v. Indiana*, 28 Ind., 257, where the court was considering whether or not a certain portion of the Wabash was a navigable stream.

By the bill in the instant case it is claimed that the Sanitary District Canal, the DesPlaines and the upper Illinois constitute a continuous waterway. Neither the upper Illinois, the DesPlaines nor the Sanitary District Canal are navigable waters of the United States. This is true under the doctrine of *Veazie v. Moor*, 14 How. 568; the *Montello* case, 11 Wall., 411; the *Neaderhouser* case just cited; *United States v. Rio Grande Irrigation Co.*, 174 U. S., 690; and *Commonwealth v. King*, 150 Mass. 221. The decision of each of those cases was governed by the doctrine that whenever a stream ceases to be navigable, it is no longer within the maritime jurisdiction of the United States. The Illinois ceased to be navigable far below the mouth of the DesPlaines.

a.

THE UPPER ILLINOIS IS NOT NAVIGABLE.

The upper Illinois above LaSalle was never a navigable stream. This fact has been officially recognized by the United States, the State of Illinois and the Commissioners of the Sanitary District, both before and since the waters of Lake Michigan were added to the DesPlaines and the Illinois.

LaSalle in 1682, stated that in the summer "there is no water at all in the river as far down as Fort St. Louis (Starved Rock near Ottawa), where the navigation of the Illinois River begins, at this season, and extends as far as the sea." (Abst., 257, 295.) And also that "It would be easier to effect transportation from Fort St. Louis to the lake by land, using horses, which it is easy to get there." (Abst., 1724.)

And St. Cosme, writing at about the same time, and referring to Fort St. Louis, said "Here navigation begins." (Abst., 50.)

Practically the same point fixed by these early explorers has been recognized in the reports, both State and Federal, as the head of navigation on the Illinois. The first official report was made by Major S. H. Long in 1816, who stated that the Illinois was navigable "about 230 miles from its mouth." (Abst., 110.)

Post and Paul, in 1824, referred to the head of the navigable waters of the Illinois River as being at the Little Vermilion. This is far below the mouth of the DesPlaines. (Abst., 2425.)

The Act of Congress of June 13, 1902, provided for a report of plans and estimated cost "for a navigable waterway of seven and eight feet depths, respectively, from the *head of navigation of the Illinois River at LaSalle, Illinois*, through said river to Ottawa, Illinois." (32 U. S. Stats. at Large, p. 364.) It is significant that Congress here recognizes the fact that LaSalle was the head of navigation in 1902, and that notwithstanding the waters from Lake Michigan had then been added, improvements would be necessary in order to obtain even a seven or eight-foot depth between Ottawa and LaSalle.

We have elsewhere in this brief (p. 120) made ref-

erence to the numerous reports of engineers proving that navigation on the Illinois ceased at, or about, LaSalle.

The Legislature of Illinois early recognized that the Illinois River above LaSalle was not navigable, that it was doubtful whether it was wise to attempt to improve it for navigation from that point to Ottawa, and that above Ottawa a canal would be required as a matter of course. This was evidenced by the Act of February 15, 1831, which authorized the Canal Commissioners to employ an engineer to examine the Illinois River from the mouth of the Fox River down to the head of steamboat navigation;

“and if, in their opinion, the navigation of the Illinois River can be improved by dams and locks, or otherwise, so as to secure its navigation as far upwards as the mouth of the Fox River, with as little expense, and as much utility, as canaling from the Fox River to the Little Vermillion, or foot of the rapids, they shall have power to terminate said canal at the mouth of the Fox River.” (Laws of Illinois, 1831, p. 42.)

That the construction of the Sanitary District Canal and the introduction of Lake Michigan water through it, would not make the upper Illinois or DesPlaines navigable, was recognized by a joint resolution of the Illinois Legislature, adopted May 27, 1897. It contained the following recital:

“Whereas, the construction of the Sanitary Canal of Chicago and the large volume of water required to flow through the same will bring lake and river navigation, *which are now 320 miles apart, within sixty miles of each other*, and the development of the intermediate section between Lockport and Utica will furnish a through route from the Great Lakes to the lower Mississippi by way of the lower Illinois River, and to the upper Mississippi by way of the Hennepin Canal, and further that the proportion of three routes constructed by the Sanitary District of Chicago will exceed the cost of extending

the largest useful navigation by way of the Illinois River to the lower Mississippi, together with that of the Hennepin Canal to the upper Mississippi." (Laws of Ill., 1897, p. 309.)

In 1900 the trustees of the Sanitary District presented a memorial to the War Department. (House Document 56th Cong., 2nd Session, 1900, 1901, p. 4.) In that memorial, referring to the Sanitary District Canal, the trustees said:

"To-day a river deeper than the draft of any lake vessel, and wide enough to float, three abreast, its broadest beams, is flowing westward and spilling its waters into the Illinois basin, where they must flow on wide, shallow and useless to commerce, because no proper channel garners the waters which should be contributing to the nation's wealth by doing the nation's work." (Proceedings Board of Trustees of the Sanitary District of Chicago, 1900, p. 6839.)

The memorial called on the United States to perform a condition contained in Section 24 of the Illinois Act of 1889, upon which the right of the United States to control the Sanitary District Canal for purposes of navigation, was to arise. Its conclusion was as follows:

"That law makes Chicago turn over to the United States Government its entire investment aggregating already, as has been shown, \$34,269,244.51, upon one condition, namely, *that it shall improve the Des-Plaines and Illinois Rivers for navigation to connect with this channel.* It remains, therefore, for those who guide the destinies of our common country to say whether the general government shall qualify as the recipient of the greatest and most magnificent gift which a single municipality has ever sought to bestow upon a nation."

We think it sufficiently appears from the foregoing that the portion of the DesPlaines which the bill claims is a section between parts of a continuous waterway, not at its lower end connect with a navigable water

of the United States, and that that navigable water begins some fifty miles below its mouth.

We will now consider the situation at the upper end of that stretch.

b.

THE SANITARY DISTRICT CANAL IS NOT A WATERWAY OF THE UNITED STATES.

In the words of the former president of the Sanitary District of Chicago, Robert R. McCormick, in his official message, 1909, nine years after the waters were turned in:

“At the present time the drainage canal as a navigable waterway extends nowhere. * * * Navigation on the drainage canal is practically *nil* owing to the fact that the drainage canal ends ‘in the air’ with no market at its inner end.” (Report of President, 1909, pp. 14, 24.) The “inner end” there referred to is the DesPlaines River.

The United States had no part in the construction of the Sanitary District Canal; it exercises no jurisdiction over it, and by the terms of the Act of the Illinois Legislature under which it is constructed, it will exercise none unless and until the United States makes the DesPlaines and the upper Illinois navigable.

But the primary and principal purpose of the Act of Illinois for the creation of drainage districts, was to provide for the preservation of the public health by improving the facilities for the final disposition of sewage and by supplying pure water.

“The fact that a navigable waterway may be created is a mere incident, and not one of the purposes for which a sanitary district is created.”

The Supreme Court of Illinois so held in *Beidler v. Sanitary District*, 211 Ill., 629, 638.

It is, of course, true that Congress has, for admiralty purposes, jurisdiction over canals built for, and dedicated to, commerce, and actually used for purposes of commerce. It was so held in *Ex parte Boyer*, 109 U. S. 629, concerning the Illinois and Michigan Canal, which, as the court pointed out, was built with lands, or the proceeds thereof, granted by the United States for that purpose, and subject to a condition prescribed in the grant, that the canal "when completed, should be and forever remain a public highway, for the use of the Government of the United States."

In *Malony v. City of Milwaukee*, 1 Fed., 611, it is said at

"an artificial waterway or canal opened by a state to public use, for purposes of commerce, and while in fact used as a highway of commerce between the states of the Union, and between foreign countries and the United States, is 'navigable water of the United States' within the meaning of that term as used to define and limit the jurisdiction of the admiralty courts."

But such is not the situation presented here.

The mere digging of a channel large enough to accommodate boats used in commerce and filling that channel with sufficient water, does not create a navigable waterway of the United States. If nothing more happened the builder might fill it up again without the consent of anyone. Dedication to commerce, and the existence of commerce, are necessary before the admiralty jurisdiction of the United States can apply.

There is no evidence in this record of any navigation on the Drainage Canal, and as we have seen, the Illinois Supreme Court has held navigation was not one of the purposes for which it was created.

It is true that it obtains its water supply from Lake

Michigan by virtue of a permit from the United States, but it cannot be successfully argued that the United States thereby acquired any control over the canal for navigation purposes, for the Act of the State Legislature under which the channel was created, and in aid of which the permit was granted, expressly declared when, and under what conditions, it should become subject to Federal control. Section 24 is as follows:

“When such channel shall be completed, and the water turned therein, to the amount of three hundred thousand cubic feet of water per minute, the same is hereby declared a navigable stream, and *whenever the general government shall improve the DesPlaines and Illinois Rivers, for navigation, to connect with this channel*, said general government shall have full control over the same for navigation purposes, but not to interfere with its control for sanitary or drainage purposes.”

But even if it be conceded, for the purpose of the argument, that the Sanitary District Canal is navigable water of the United States, yet the mere fact that the DesPlaines connects with it would not bring the latter within the jurisdiction of the United States. It must further appear that boats engaged in interstate commerce can pass from it into the Canal, or from the latter into it.

We have shown that the upper Illinois is not navigable. The same facts show that the DesPlaines is not, and we will add other evidence to that effect when we discuss that river. (*Post*, p. 96.)

It is submitted that under the authorities cited early in the discussion under this point, neither the Drainage Canal, the DesPlaines River, nor the Illinois above the point where it is practically navigable, is a waterway of the United States and subject to its jurisdiction under the Commerce clause of the Constitution.

POINT X.

PELLEE IS SEEKING TO USE THE ACT OF MARCH 3, 1899, TO ACCOMPLISH AN INEQUITABLE AND UNJUST END. BEFORE THE ENTERPRISE WAS ENTERED UPON, THE WAR DEPARTMENT ASSURED APPELLANT'S PREDECESSOR THAT THE DESPLAINES RIVER WAS NOT A NAVIGABLE STREAM, AND THAT THE PROPOSED DAM WOULD NOT INTERFERE WITH, BUT WOULD AID IN, FUTURE IMPROVEMENTS OF THE RIVER, AND THE INVESTMENT OF APPELLANT WAS MADE UPON THAT ASSURANCE.

A.

IF HAD THE DESPLAINES BEEN NAVIGABLE, THE PURPOSE OF THE ACT WOULD HAVE BEEN EFFECTED BY THE PROCEEDINGS HAD BEFORE THE WAR DEPARTMENT.

In the light of the record in this case, the claim presented by the United States shrivels to the driest husk of technicality. Before any money was invested in this enterprise, everything possible to be done to make certain that the dam, if constructed, would not obstruct any future plans of the United States with reference to the river, was done. The War Department in substance, gave its approval, and the only reason why it did not formally approve the plans, was because it did not consider the DesPlaines River a navigable water of the United States. The Court of Appeals, in its opinion, makes no reference to this phase of the case, although it was earnestly urged in the printed and oral arguments.

The facts we are about to narrate show that one Department of the United States Government is, in this proceeding, attempting to apply the Act of March 3, 1899, not to effect the purpose for which it was passed, but rather to accomplish an unjust and inequitable end, to the great injury of persons who, in good faith, acted upon a decision of another Department of that Govern-

ment. To make this clear will require a somewhat detailed statement of the facts leading up to the present situation.

The United States in this action, is endeavoring to destroy a large investment of appellant upon the claim that appellant was constructing a dam in a navigable water of the United States before the plans for the same had been submitted to and approved by, the Chief Engineer and the Secretary of War. Such submission and approval were all that was required, had the DesPlaines River been navigable. The consent of Congress is not necessary under the Act when the navigable portions of the river in question are wholly within the limits of a single state. In such case the authority of the Legislature of that state, and the approval of the plans by the Secretary of War are alone required.

The State of Illinois through its Supreme Court, has held in *State v. Economy Light & Power Company*, *supra*, that the stream was not navigable and that appellant, in building this dam, was doing what it had a lawful right to do. In *Canal Trustees v. Haven*, 5 Gil., 548, it was stipulated that the evidence showed that the DesPlaines was not a navigable stream. Manifestly then appellants' predecessor could not have been required, and in fact had no standing to ask, authority from the Legislature of Illinois.

b.

THE ONE, AND ONLY THING, THEREFORE, ON WHICH THIS ACTION OF THE UNITED STATES CAN BE RESTED, IS THE ABSENCE OF A FORMAL APPROVAL BY THE CHIEF OF ENGINEERS AND THE SECRETARY OF WAR.

Two facts are indisputable: One that the plans were not submitted for formal approval under the Act, be-

use the stream was, and for nearly a century had been, held by the War Department to be unnavigable; the other, that if the river had, in the opinion of the Department, been navigable, the plans would have been formally approved, as they were in fact informally approved.

It is equally clear that Congress in passing the Act was not concerned about forms, but facts; the formal approval was only an incident to the end to be accomplished—protection of navigation.

In *Wilson, Attorney General, v. Hudson County Water Co.*, 76 N. J. Eq., 543; 76 Atl., 560, 565, the court, in speaking of the Act in question here, said that it was

“a mere regulation for the benefit of commerce and navigation, and that the license or permission of the Secretary of War is only a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation.”

Substantially the same language was used in *Cobb v. Commissioners of Lincoln Park*, 202 Ill., 427.

Secretary of War Taft so construed the Act, in a hearing concerning the dam in question in this suit.

c.

THE INSTANT CASE THE CHIEF OF ENGINEERS AND SECRETARY OF WAR FOUND NOT MERELY THAT THE PROPOSED STRUCTURE WOULD NOT INTERFERE WITH COMMERCE, WHICH WAS ALL THAT WAS REQUIRED UNDER THE ACT OF 1899; THEY FOUND THAT THERE WAS NO COMMERCE TO BE INTERFERED WITH, AND THAT THE DESPLAINES RIVER WAS NOT NAVIGABLE.

A decision that a proposed structure would not obstruct navigation, could not be put in more positive form than by declaring that the stream in question was not

navigable. In the instant case, however, the War Department went further, for it assured appellant's predecessors that the proposed dam was in harmony with tentative plans of the Government for making the stream navigable. And appellant made its investment, and began the construction of the dam on the faith of that assurance.

The persons interested in the project would have been justified in proceeding with the building of the dam without approaching the War Department, because that Department had made a record extending over nearly a century, that in its judgment the DesPlaines was an unnavigable stream. Elsewhere in this brief (pp. 118, 119, 125, 146) we have referred to the reports of surveys made by its engineers, which sustain this statement. Will it be contended that an owner, contemplating improvement of a stream classed as unnavigable by the War Department, must ask a permit from that Department under the provisions of the Act of March 3, 1899? Or that if he proceeds with his work, relying upon such classification, he is liable to be enjoined because he did not ask the Department to take jurisdiction over a stream which, according to its own repeated findings, was not within its jurisdiction?

But Mr. Munroe and Mr. Logan did not, as they might properly have done—Secretary Taft, as will be seen later, said they might—rely on the fact, always recognized by the War Department, that the stream was not navigable. They submitted their plans for the dam to that Department which alone had jurisdiction in the premises, and which having power to approve plans for obstructions in navigable streams, must, as an incident to the exercise of it, have had power to pass upon the question of navigability. The plans were presented to the Department in March, 1906. The purpose—as stated in a letter of Lt.

Col. Bixby, Engineer in Charge at Chicago, to Brig. Gen. Mackenzie, Chief of Engineers at Washington—was

“to make evident that the proposed dam construction not only does not conflict with any existing U. S. law, but also will assist rather than injure the possible future navigation of the DesPlaines and Illinois Rivers, should the improvement of such rivers ever be authorized by Congress * * * and * * * to secure from the War Department some expression of opinion, informal or otherwise, so far as it can properly be given, *that will allow them to assure all inquirers that the War Department so understands the situation, and is making no objection to such prompt progress of the work as is necessary to a business enterprise of its magnitude and importance.*” (p. 2873.) (Italics ours.)

In the same letter Col. Bixby said:

“*The DesPlaines River, so far as now known to this office, has never yet been considered a navigable stream of the United States. It is, therefore, apparently as yet subject to such jurisdiction as applies to all other unnavigable streams, and not subject to the provisions of Sections 9-13, Act of March 3, 1899, or to other similar U. S. legislation.*” (p. 2872.) (Italics ours.)

In passing, we suggest that it would have been a most remarkable thing that the officer of the War Department in charge of the district through which the Des-Plaines flows, and whose office was within a few miles of it, did not know that it was a navigable water of the United States, if in fact it was such.

Col. Bixby, in the same letter, advised Gen. Mackenzie that Mr. Munroe's proposition ought to be encouraged, and that he should receive from the War Department such expressions of favorable consideration as might be properly allowable under such circumstances. Referring to the report of a Board of United States Engineers of August 26, 1905, upon the feasibility and cost of a navigable waterway from Lockport, Illinois, *via* the Des-

Plaines, Illinois, and Mississippi Rivers, he quoted from it the statement that the plan submitted by that board was

“not designed to develop water power, but there will probably be no difficulty in modifying it, so as to conform to such development if those who are to benefit thereby will co-operate with the Government. They should pay the cost of the dams, and the damage for flowage, which is no more than they would be compelled to do if the Government made no improvement.” (p. 2873.)

Col. Bixby's letter then proceeded as follows:

“The plans herewith submitted by Mr. Munroe show plainly a proposed co-operation such as that described in the above board report, offered in such manner as not only to pay the cost of this power dam, and to protect the United States against flowage damage, *but also to lessen by one the number of locks and dams necessary for future navigation and to otherwise save both time and money* (\$142,385 in first cost, and \$4,000 annually thereafter for maintenance and operation) to the United States, in case Congress should finally decide to undertake the improvement covered by the August 26, 1905, board report, *or to otherwise make this river navigable in this neighborhood.*” (pp. 2873-2874.) (Italics ours.)

He suggested that encouragement of the proposition be given with provisos for the contingency that

“the river shall become a navigable water (*which it appears not to be at present*) and when the United States shall decide to give up the use of the canal and to assume the improvement of the river. Until such time I do not see how the War Department can assume any definite jurisdiction of the DesPlaines River, or make any definite demands upon any water power company already organized for the use of this river.” (p. 2874.) (Italics ours.)

These provisos reappeared in the letter next to be referred to.

Under date June 7, 1905, Robert Shaw Oliver, Assistant Secretary of War, wrote to Mr. Munroe stating certain conditions, and concluding:

"If these conditions are complied with, in the opinion of the Chief of Engineers, U. S. Army, concurred in by this department, the work proposed is in general harmony with the work of improvement recommended by the Board of Engineers appointed under authority of the River and Harbor Act of June 13, 1902 (32 Stat. L., 331, 364), in its report dated August 26, 1905, printed as House Document No. 263, 59th Congress, first session. Inasmuch, however, as Congress has not as yet authorized the improvement of this river, this department does not deem it expedient to take further and definite action in the matter of approving the plans." (pp. 2876-2877.)

The plans, it will be observed, were not submitted for approval, but only to get such assurance as the War Department gave. Not being a navigable stream, the Department had no jurisdiction over it. IT IS QUITE APPARENT, HOWEVER, FROM THIS CORRESPONDENCE THAT HAD IT BEEN NAVIGABLE, FORMAL APPROVAL WOULD HAVE BEEN GIVEN.

Therefore, even if it can be assumed that the river was in fact navigable, although the War Department was ignorant of the fact, the purpose of the Act as defined in the authorities, was effected. There was in the language of the court in *Wilson, Attorney General, v. Hudson County Water Co., supra*, "a finding and declaration of such officer that such proposed structure would not interfere with or be detrimental to navigation." As we shall show, having so found, the Secretary of War had no Constitutional power to refuse permission, even had he been so inclined.

But it is clear, not only that it was the judgment of the Department that the dam would not interfere with navigation, but that the Department did in fact, approve

its construction. The letter of the Assistant Secretary said:

“It is understood that yourself and associates are willing to comply with the following conditions:” (p. 2875.)

And then followed three conditions, having to do with the construction, the protection of the United States from flowage damage, and the conveyance to the United States of a strip of land at least 150 feet wide across the north end of the dam, for a boat lock, if it so desired. How could that have been “understood,” unless it was also understood that the United States approved of the building of the dam? So far as the work progressed these conditions were complied with, all the lands to be flowed were acquired by appellant, and while the remainder of the dam was built of concrete, 150 feet at the north end was built of soft earth, so that the Government, if it ever made the river navigable, might have the lock which was provided for. (pp. 2199-2200.)

But the War Department's connection with the matter did not end there. Thereafter, on December 15, 1906, the State of Illinois made an application to the Secretary of War to prevent him from granting a permit for the dam. As the result of it the Secretary of War, Mr. Taft, gave a decision which is an official record, in which, among other things, he said:

“The truth is that the DesPlaines River, not being a navigable stream, no permit was necessary to put any obstruction in it which the War Department could prevent. But even if it had been a navigable stream, and even if the application had been made, and properly made to this Department to say whether this would interfere with navigation, if the Department concluded that it would not interfere with navigation, it is not within the power of the Department to withhold its expressing such an opinion and granting such a permit, so far as the United

States is concerned, for the purpose of aiding the state in controlling the water power. * * * All the United States does, assuming it to be a navigable stream, is merely to protect the navigation of the stream. * * * Therefore, what General Mackenzie has done out of the kindness of his heart does not commit this Department to any assertion of authority in the matter, and certainly does not carry us to the necessity of retracing our steps and saying that they shall not go on with this, when we had not any power to interfere at all." (pp. 1936-1938.)

At the hearing upon that application of the State of Illinois the following colloquy occurred between Secretary Taft and the then Chief of Engineers, General Mackenzie:

"Secretary Taft: It is not now navigable (referring to the Des Plaines River).

General Mackenzie: It is not now navigable.

Secretary Taft: But you are not seeking to exercise any authority over an existing navigable stream?

General Mackenzie: No, sir.

Secretary Taft: Or to grant a permit so as to protect interests of the United States in the stream?

General Mackenzie: No, sir.

Secretary Taft: *Suppose they were to go ahead without coming here at all. You would not go into court, or could not, by an order of this Department, prevent them from doing anything, could you?*

General Mackenzie: I do not think we could. Of course, under all the conditions, so far as they have gone, possibly we could call the attention of the Department of Justice to the matter, simply to have them consider it as a legal proposition.

Secretary Taft: Where would the Department of Justice get any power?

General Mackenzie: Only from the general law—that in case of violation of any law for the protection of navigable streams.

Secretary Taft: Yes, but the DesPlaines is not a navigable stream, is it?

General Mackenzie: It is not, to-day, sir.

Secretary Taft: And it could not become so ex-

cept by a declaration of Congress to carry work on it.

General Mackenzie: That is it, exactly.

Secretary Taft: Then where do I get any power to deal with it at all?

General Mackenzie: I do not know that there is any, Mr. Secretary." (pp. 3223-3224.)

The gravamen of the case against appellant is that a formal permit was not obtained from the Secretary of War to obstruct a navigable stream. In the above colloquy we have a declaration from that Secretary that appellant could have proceeded without going to the War Department at all, and that neither that Department, nor the Department of Justice, could have interfered because the stream was not navigable.

Relying upon assurances from the War Department appellant purchased the property and began the work. It executed a mortgage securing \$3,000,000 of bonds of which \$2,000,000 were sold (pp. 2199, 3182, 3185). Contracts were entered into by it for the construction of the dam, and the purchase of material, obligating it heavily, and at the time when construction was stopped by a preliminary injunction in the suit brought by the State of Illinois, nearly \$200,000 had actually been paid on account of the work. (p. 3185.)

It was not until more than three years had elapsed that the Government of the United States indicated in any way that it no longer approved the prosecution of the work, which in the beginning it had encouraged, and the first notice of such disapproval was the bringing of the present action.

This Court is, therefore, dealing with a case in which a court of equity has exercised its extraordinary power to enjoin the erection of a structure in a stream on which there was no commerce to be obstructed, on the ground that no permit had been obtained from a Secretary of

ar who had asserted that no permit could be obtained because the stream was not navigable and therefore was not within the control of Congress or the Federal Courts. We submit that upon this record, if instead of the government of the United States, a private individual corporation were seeking the relief which the trial court granted and which the Court of Appeals affirmed, a court of equity, upon the simple narration of this history, would say that the complainant's claim had no merit of title to respect in such a court, and that it merited severe condemnation.

The Federal courts do not look with any more favor upon such an inequitable claim when put forward by the United States than when it is made by an individual.

In *Chicago, Burlington & Quincy Railway v. Drainage Commissioners*, 200 U. S., 561, p. 593, this Court said:

"If the means employed have no real, substantial relation to public objects which government may legally accomplish; if they are arbitrary and unreasonable, beyond the necessities of the case, the judiciary will disregard mere forms and interfere for the protection of rights injuriously affected by such illegal action. The authority of the courts to interfere in such cases is beyond all doubt."

In *Monongahela Bridge Company v. United States*, 16 U. S., 177, 195, this Court said:

"Learned counsel for the defendant suggests some extreme cases, showing how reckless and arbitrary might be the action of executive officers proceeding under an Act of Congress, the enforcement of which affects the enjoyment or value of private property. It will be time enough to deal with such cases as and when they arise. Suffice it to say, that the courts have rarely, if ever, felt themselves so restrained by technical rules that they could not find some remedy, consistent with the law, for acts, whether done by government or by individual persons, that violated natural justice or were hostile to the funda-

mental principles devised for the protection of the essential rights of property."

We submit that the Government's attempt to avail itself of the Act of March 3, 1899, in this case, is wholly arbitrary and indefensible in law or morals.

d.

THIS COURT HAS INTIMATED THAT THE ACTS OF THE WAR DEPARTMENT, ABOVE NARRATED, SHOULD PREVENT INTERFERENCE WITH THE CONSTRUCTION OF THE DAM.

The judgment of the Supreme Court of Illinois in the State case was taken by writ of error to this Court. The writ was dismissed for lack of jurisdiction, but we think the opinion (*State of Illinois v. Economy Light etc. Co.*, 234 U. S., 497), shows that this Court had well defined views on the merits of the State case, which are equally pertinent to the merits of the present case. We refer in more detail to it elsewhere in this brief. Here we call this Court's attention to what it said as to the submission of the plans for the proposed structure and the action of the War Department with reference to the same.

The last two paragraphs of its opinion went directly to the question of the Federal right to enjoin the building of the dam irrespective of whether the State or the United States was the complainant. The court said:

"It is said, however, that by the Acts of 1899, 1900 and 1902, Congress has taken jurisdiction of the DesPlaines River. If so, the State is not the instrument through which the jurisdiction can be exercised." (p. 524.)

If this Court meant to go no farther than to place its judgment upon the fact that if a Federal right existed, the State was not the proper party to enforce it, nothing more needed to be said. That was fully expressed. But it proceeded to show that no Federal right in fact existed.

undertook to state what the situation would be, even if the State could enforce an existing Federal right. The next paragraph, referring to certain Acts of Congress for surveys of the Illinois and DesPlaines Rivers reads as follows:

"But the cited acts are not appropriations for improvements undertaken but for improvements which may be undertaken; not a jurisdiction exercised but a jurisdiction to be exercised. And, as we have seen, it is alleged in the answer, and the allegation is sustained by the evidence, that the plans of defendant in error's structure were submitted to the War Department and it was declared by that Department, 'The work proposed is in general harmony with the work of improvement recommended by the Board of Engineers appointed under the authority of the Rivers and Harbors Act of June 13, 1902. (32 Stat., 331, 334, C. 1079.)' But the Department, inasmuch as Congress had not authorized the improvement of the river, did 'not deem it expedient to take further and definite action in the matter of approving the plans.' It is manifest, *therefore*, that the state has no right under Federal laws which it may assert for itself or '*on behalf of the citizens of all of the United States*,' and the motion to dismiss must be granted." (p. 524; italics ours.)

So that even if the State were the instrument through which the jurisdiction could be exercised, yet for the reason stated in the last paragraph, there was no Federal right to be exercised.

It is to be noted that the Court says "It is manifest *therefore*." The word "therefore" relates back to the submission of the plans and the declaration of the War Department with regard to them. We submit that the meaning of this paragraph is that neither the State nor the general Government in the face of this record, is entitled in a court of equity, to restrain that which the Government itself not only approved but encouraged.

e.

AS TO THE CLAIM THAT THE SUBMISSION OF THE PLANS TO THE
WAR DEPARTMENT WAS A TRAP.

It was contended in the Court of Appeals, and may again be contended here, that Munroe submitted the plans to the War Department in order to trap the Government by securing by indirection, some committing statement by the engineer. It is unthinkable that if Munroe, and his associates, believed that the river was navigable they would have invested a huge sum of money upon a "committing statement" from a Government engineer, knowing that the fact was contrary to the statement, and that they might be ousted from the river at any time. What they would naturally have done would have been to ask for a permit to build the dam, and they could have asked it with almost absolute assurance that it would be granted, and they would then have had a clear legal title to maintain their dam, and a solid basis for the \$2,000,000 of bonds which they floated, and for their further investment.

We say that it was practically certain that such a permit would have been granted because, under the conditions existing, including the fact that there was not, and had not been from earliest settlement of the country any navigation on the river, and that there were bridges on it in numerous places which made navigation impossible, there was no reason, within the meaning and spirit of the law, why the permit should not have been granted. Secretary of War Taft, in his opinion, as has been seen, definitely so stated.

If, therefore, a permit had been asked for, it could not have been refused. To have attempted to obtain a doubt-

"committing statement," when a permit was assured asked for, would have been simply stupid.

On the Court of Appeals counsel for appellee claimed that the Secretary of War was misled as to the navigability of the river by former Congressman Snapp, who, they say, was in the employ of the Economy Light Power Company.

He was not. He stated himself, at the hearing, that he was there representing the people of Joliet, in which city he lived. He said to the Secretary of War that his interest was to see to it that the development of power under the plans of Munroe and his associates, would not interfere in any way with the development of the waterway, and that he compelled them by local pressure to submit the matter to General Mackenzie, not for the purpose of asking for permission to do the work, but for the purpose of satisfying himself, and his people, that the work contemplated would not, in the event that Congress authorized the waterway, interfere with it in the least, or make it more expensive to the Government. (pp. 3222, 3223.) As has been shown, the work, in the opinion of the War Department would not only not so interfere, but in the event of the improvement of the river for navigation, it would have saved the Government a large sum of money. It was the Chief of Engineers himself who told the Secretary of War that the river was not unnavigable.

POINT XI.

THE DESPLAINES RIVER IS NOT A NAVIGABLE STREAM**a.**

THE SUREST TEST OF WHETHER A STREAM, TRAVERSING A SETTLED COUNTRY, IS NAVIGABLE, IS WHETHER IT HAS BEEN USED FOR PURPOSES OF USEFUL COMMERCE. ACCORDING TO THIS TEST THE DESPLAINES RIVER IS NOT NAVIGABLE.

Elsewhere we refer to the evidence of non-user. It is sufficient here to repeat that the trial judge, in his opinion, said there was "no evidence of actual navigation within the memory of living man," and the Court of Appeals concurred in that finding, and that the Supreme Court of Illinois declared that there was not in the entire record a well authenticated instance in which a boat engaged in commerce, navigated the waters of the Des-Plaines River. The record in this case is the same in that particular as was that in the State case. In the days of early settlement before there were railroads or good highways, every stream susceptible of use was used. But no settler ever went to his destination on the Des-Plaines or upper Illinois, by water, no trader carried his merchandise, and no farmer his produce over them. The roads, or the soggy prairies, were used as far as La-Salle, and thence the Illinois River.

Former Governor Van Sant of Minnesota, who was a river boatman from 1857, and whose testimony on behalf of the State of Illinois in its case against appellant, was introduced in this case by the Government, testified on cross examination that it was a fact that in early days

"the effort was to build boats adapted to the small streams, so as to make them available for commerce, and *whenever there was a river that could be used, for commerce in some way or other, they built a boat to navigate it.* In those early days they resorted to the rivers as a matter of course, if the river could be used, and they built some kind of a boat, if one was possible, to navigate every stream where commerce can be carried on." (Abst., 2381.) (Italics ours.)

While in definitions of navigability it has been said that rivers

"are navigable in fact when they are used or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water," *Packer v. Bird*, 137 U. S., 661,"

yet it is said in Gould on Waters (Sec. 43):

"The extent to which a river * * * is used for navigation is the strongest evidence of its navigable capacity."

We think no case can be found where a river has been held navigable which, after settlement, has not been actually used for "useful commerce." The courts and textbook writers have many times declared such actual user to be the real test.

In Farnham on Waters (p. 121) it is said:

"The capacity as shown by the use to which it is put is the true criterion by which to judge the question of navigability."

And at p. 125 the author says:

"In a country which has long been settled the fact that a stream has never been used for navigation is strong evidence that in the opinion of the people who might use it, it is not of sufficient size to make such use valuable, so that the fact of use or no use may be of great weight in determining whether or not the stream is navigable."

In *State v. Gilmanton*, 14 N. H., 467, 480, the court said:

“But there is another important consideration. It does not appear that the river was ever used by the public for the purpose of a highway. This is the surest test, and is the one relied on in the cases above referred to.”

Burroughs v. Whitwam, 59 Mich., 226; 26 N. W., 491, the court, at p. 492, said of the stream under consideration in that case:

“It has never been used at all for public purposes, except fishing, and there is no evidence that it can be used hereafter for any other purpose save pleasure. * * * Indeed, it was not seriously contended in the argument that it had ever been used for any public purpose as a highway; but stress was laid upon some testimony in the case of ex-Governor Begole and others, to the effect that, compared with other streams used for the purpose of floating logs, this seemed a first class stream, in the opinion of the witness; but facts are better than theories and disprove them. *In 50 years, during which Genesee County has been converted from a wilderness into a garden, no one has ever yet thought of running a log or stick of timber down this creek to the City of Flint. This is pretty nearly conclusive evidence that that stream has never been susceptible of public use for floatage, either valuable or otherwise.*” (Italics ours.)

Just so in the case at bar, pages were filled with expert and theoretical evidence in the endeavor to show that the DesPlaines is a navigable stream. But in *State v. Economy Light & Power Company*, 241 Ill., 290, 336, in language quoted by this Court (234 U. S., 520), it was said:

“Whatever may be thought of the preponderance of it one way or the other, it can have but little weight as against the uncontroverted fact that the river has never been used as a public highway for commerce.”

In *Webster v. Harris*, 59 L. R. A., 324, 330 (Tenn.), the court said:

“In determining the natural capacity of a body of water for navigable purposes, whether navigable in law or in the ordinary sense, the extent to which it is used for purposes of navigation should be looked to, *and this affords the strongest evidence as to its navigability or non-navigability in either sense.*” (Italics ours.)

b.

THE ILLINOIS AND MICHIGAN CANAL WAS BUILT PARALLELING THAT PORTION OF THE RIVER IN WHICH THE PROPOSED DAM WAS TO BE ERECTED, BECAUSE THE DESPLAINES WAS NOT NAVIGABLE.

Had the DesPlaines River been a navigable stream, the Illinois and Michigan Canal would not have been built. The expense was enormous for the times, justified only by the exigencies of the situation. No commerce passed between the navigable waters of the Illinois and Lake Michigan, except by wagon and stage. Governor Duncan in a message to the Illinois Assembly spoke of the proposed canal to connect “by a short and direct route, two great navigable waters,” referring to Lake Michigan and the Illinois River. (p. 2821.)

In a similar message, dated December 2, 1834, Acting Governor Ewing spoke of the contemplated connection of Lake Michigan “with the navigable waters of the Illinois.” (p. 2820.)

By the Act of Congress of March 30, 1822, the state was authorized to survey, and mark, through the public lands of the United States, the route of a canal connecting the Illinois River with the southern bend of Lake Michigan.

That was the only legislation of Congress in force when the Act of the Legislature of Illinois of February 14, 1823, was passed, providing for devising measures “to

effect the communication, by canal and locks, between the navigable waters of the Illinois River and Lake Michigan." In passing, we call attention to the fact that the Legislature, by this, its earliest, Act on the subject, recognized that there was not communication between Lake Michigan and the navigable waters of the Illinois, and that such communication if effected at all must be by canal and locks. Section 3 of the Act directed the commissioners thereby appointed to cause a survey to be made for

"determining the most eligible and proper route for the same (the canal) and to cause all necessary surveys and levels to be taken. * * *"

The commissioners employed Justus Post and R. Paul as the engineers to make such survey. They began their examination in the autumn of 1823.

Post and Paul fixed the termini of the canal, one at the head of the Chicago River and the other a few miles below the rapids on the Illinois River near its confluence with the Little Vermilion, omitting all of the DesPlaines below Lockport, and the reason why they did so is indicated in the report of the commissioners as follows:

"From the mouth of the Little Vermillion, above referred to, neither the Illinois nor the DesPlaines is navigable in low stages of water as they are frequently interrupted by rapids; but no serious obstacles present themselves in effecting a canal navigation from the head of the navigable waters of the Illinois River to Lake Michigan." (p. 1136.)

Up to time of the building of the canal, no boat had been devised which did, or could, use the DesPlaines River for the purposes of commercial navigation, as that term has been defined in the decisions of this Court.

The record shows that many persons survived at the time of the hearing of the State case, in 1908, who were living in 1848—the year when the canal was opened for

navigation—and old enough at that time to have known of, and to have had fixed in their memories, the existence of navigation had there been any. Many witnesses were called who knew the river before the opening of the canal; of these several were above the age of twelve years when the canal was opened, and one was then thirty-three years of age. No one of these witnesses had ever seen, known, or heard of merchandise or passengers having been taken up, or down, the DesPlaines River, or had ever seen anything larger than a hunter's boat upon its waters. In direct conflict with this uncontradicted testimony, the Court of Appeals in its opinion, said that

“After the year 1848, when the Illinois and Michigan Canal was constructed, commerce that had formerly been carried on the DesPlaines River was carried on the canal.”

To show that this statement is not only unfounded, but is in direct conflict with all the evidence on the subject, we refer to that evidence in another portion of this argument. (p. 131.)

Each of the witnesses who knew the river before 1848 testified that they, and their neighbors went by road to, and from, Chicago, and that their farm products were taken by ox teams or horses, and that they met wagons from points as far as Bloomington going to and from Chicago. One of these witnesses testified that he had occasion to go to St. Louis to buy goods for his store, that he brought them to Ottawa by boat and from Ottawa to Lockport by wagon. (pp. 2506-2507.) There was a regular stage line running from Chicago to Peru, through Joliet and Lockport, as early as 1836, and a through route for the carriage of merchandise was also then advertised. (pp. 2524, 3126.)

Upon the fact alone, established by these witnesses, that all the produce of the DesPlaines Valley, and of the

Illinois above Ottawa, was carried on over wagon roads in a primitive time, when every stream that was capable of bearing up boats adapted to commercial purposes, was naturally resorted to, we would be willing to rest our contentment that the DesPlaines was not, in its natural condition, navigable. That the State took upon itself the burden and expense of the building of a canal paralleling and did so, as it stated in its memorial to Congress, in order to "form an important addition to the great connecting links in the chain of internal navigation" would seem to leave no room for doubt in the minds of reasonable men that such a link did not exist prior to its construction.

c.

THE NAVIGABILITY OF THE DESPLAINES IS NOT TO BE DETERMINED BY ITS CAPACITY AS CHANGED BY THE ADDITION OF WATERS THROUGH THE SANITARY DISTRICT CANAL.

As Point I, *supra*, we have stated the rule that the test of navigability is whether in its natural condition it affords a channel for useful commerce. One of the most recent enunciations of this doctrine is found in the important case of *United States v. Cress*, 243 U. S., 319, where the court said:

"It follows from what we have said that the servitude of privately owned lands forming the banks and bed of a stream, to the interests of navigation, is a natural servitude, confined to such streams as in their ordinary and natural condition are navigable in fact and confined to the natural condition of the stream."

In *The Montello*, 20 Wall., 430, 443, the court said:

"The vital and essential point is whether the natural navigation of the river is such that it affords a channel for useful commerce."

It is not the fact that every stream which, in the ear-

day when there was no other means of transportation, was capable of being used at certain seasons of the year, by craft which could be carried over numerous portages is a navigable water of the United States. Such a stream was the DesPlaines River.

In the *Montello* case, 20 Wall., 430, 442, the court said:

"It is not, however, as Chief Justice Shaw said, 'every small creek in which a fishing skiff or gunning canoe can be made to float at high water, which is deemed navigable, but in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture.'"

And in *Donnelly v. United States*, 228 U. S., 708, 709, the Supreme Court held that evidence which

"showed an apparently irregular traffic, in times of high water only, employing Indian canoes, 'dug-outs,' and at certain times small steamboats and gasoline launches,"

did not establish navigability of the stream there in question.

So, in *Hubbard v. Bell*, 54 Ill., 110, the court held that navigable waters must be capable of practical general uses.

In *Schulte v. Warren*, 218 Ill., 108, 119, it was held that

"a stream is navigable in fact only where it affords a channel for useful commerce and of practical utility to the public as such. The fact that there is water enough in places for rowboats or small launches answering practically the same purpose, * * * does not render the waters navigable."

In *Mayor, etc., v. Harlow* (Md.), 98 Atl., 852-857, the court said:

"A theoretical or potential navigability or one that is temporary or precarious, and unprofitable, is not sufficient."

It is alleged in the bill of complaint that because since

the opening of the Sanitary District Channel, a large amount of water has been diverted from Lake Michigan to the DesPlaines River, the Sanitary District Canal is a part of the navigable waters of the United States, and that the DesPlaines itself below the point at which it connects with that canal "has been continuously" part of the navigable waters of the United States. Substantially all of the opinion evidence introduced by the United States concerned the river in its condition as altered by the inflow of water through this Canal.

The trial court in its opinion said:

"Also claim of right to injunction because river is now navigable within meaning of *Montello* doctrine, untenable, because present volume of water due to artificial cause."

This language must be construed to refer to a *claim* that the river is now navigable and not as expressing an opinion that it *is* so. As we show elsewhere there is not a particle of evidence that the river is now navigable for any purpose.

But even if the river as changed by artificial means had in fact become navigable, the rights of owners would not be affected thereby.

It is unnecessary for us here to present all the considerations which establish the fact that the navigability of the river cannot be determined by its condition as created by artificial means. That question was fully considered by the Supreme Court of Illinois, in *Illinois v. Economy Light & Power Co.*, *supra*. That Court said:

"Appellant strongly contends that the rights of appellee as riparian owner are to be determined with reference to the conditions that exist since the deepening of the Illinois and Michigan Canal and the construction of the Sanitary District Channel, by means of which the volume of water in the DesPlaines River has been greatly increased. It is argued that the

navigability of the river is to be determined with reference to the changed condition and not as the stream existed in a state of nature. Appellant's position, as we understand it, is this: Assuming the stream to be unnavigable in its natural condition, the State may by artificial means so change the stream as to make it navigable and thus destroy the vested property rights of riparian owners upon the said stream. The position is untenable. The property rights of riparian owners in the bed of an unnavigable stream are as sacred as any other property right, and such owners cannot be deprived of those rights without compensation, by artificial additions to the waters of the stream whereby it is rendered navigable. To hold that the State can by artificial means make a stream navigable which in a state of nature was not navigable, and thereby deprive riparian owners of their property rights in the bed of the stream, is simply to hold that private property may be taken or damaged for public use without compensation." (p. 324.)

This Court in its opinion on the writ of error in that case analyzed at considerable length, this finding of the Supreme Court of the State, and it is evident that its views were in harmony with those of the State court. (234 U. S., 520-523.) Among other things this Court said:

"The Court seemed to consider that it had decided all the contentions of the state when it had decided the question of the navigability of the river both in its natural condition and its condition after the addition of the waters of the Sanitary District. The fact was and is pivotal." (p. 253.)

In *Philadelphia v. Stimson*, 223 U. S., 605, which related to the powers of the Government to exercise control over navigable waters under the Act of 1899, the Court held that the owners' rights are not affected "when the change in the stream is sudden, or violent, and visible," but only when it is "gradual and imperceptible."

The same doctrine is held in *Schulte v. Warren*, 218 Ill., 108.

In the instant case the increase in the volume of the DesPlaines River was "sudden, violent and visible." It was caused by the raising of a gate of the Bear Trap Dam at the end of the Drainage Canal at Lockport, and by the shutting of that gate the stream can be at any time reduced to its original volume. Indeed, the volume is continually regulated by the operation of the gate.

In *United States v. Cress, supra*, this Court said:

"In Kentucky, and in other states that have rejected the common law test of tidal flow and adopted the test of navigability in fact, while recognizing private ownership of the beds of navigable streams, numerous cases have arisen where it has been necessary to draw the line between public and private right in waters alleged to be navigable; and by an unbroken current of authorities it has become well established that the test of navigability in fact is to be applied to the stream in its natural condition, not as artificially raised by dams or similar structures; that the public right is to be measured by the capacity of the stream for valuable public use in its natural condition; that riparian owners have a right to the enjoyment of the natural flow without burden or hindrance imposed by artificial means, and no public easement beyond the natural one can arise without grant or dedication save by condemnation with appropriate compensation for the private right." (p. 321.)

In *Thunder Bay River Boom Company v. Speechly*, 31 Mich., 336, the court, by Cooley, J., combated vigorously the idea that private rights could be destroyed by thus altering the condition of a stream, saying:

"The doctrine that this may be done without compensation to parties injured is at war with all our ideas of property and of constitutional rights. * * * As was remarked in *Morgan v. King*, 35 N. Y., 460, the question of public right in a case like this is to

be decided without reference to the effect which artificial improvements have had in the navigable capacity of the river; in other words, the public right is measured by the capacity of the stream for valuable public use in its natural condition; and any attempt to create capacity at other times at the expense of private interests can be justified only on an assessment and payment of compensation."

In *Druley v. Adam*, 102 Ill., 177, where the right of a riparian owner to the use of the water added to the Des-Plaines by the Illinois & Michigan Canal was in question, the same doctrine was applied.

Other leading cases which hold that a State cannot by artificial means make a stream navigable which in a state of nature was not so, and thereby deprive riparian owners of their property rights in the bed of the stream, are

Tourtelotte v. Phelps, 4 Gray, 370.

Lovington v. St. Clair County, 64 Ill., 56.

City of Chicago v. Laflin, 49 Ill., 172.

In the latter case the Supreme Court of Illinois said:

"It would be monstrous that the city should, at pleasure, make changes in this stream so as to render buildings on the wharves an obstruction and then require their removal without compensation. Such power would be more vast and absolute than can be exercised by the State itself."

d.

THE ATTEMPTED USE OF THE RIVER IN PRE-SETTLEMENT DAYS BY EXPLORERS AND TRADERS PROVED THAT IT WAS UNNAVIGABLE. THE RECORD IN THE STATE CASE WAS SUBSTANTIALLY THE SAME AS IN THE INSTANT CASE. SUCH ADDITIONAL USE AS WAS SHOWN IN THIS CASE TENDED TO SUPPORT THE CONCLUSION THAT THE RIVER WAS NON-NAVIGABLE IN THE EARLIEST HISTORICAL TIMES.

In *Wear v. Kansas*, 245 U. S., 154, this Court, referring to the decision of the State court that the Kansas river was navigable, said:

“The fact is of a kind that should be established once for all, not perpetually retried.”

In the instant case, the trial judge declined to give any weight whatever to the finding of the Illinois Supreme Court, that the DesPlaines was not a navigable stream. In his opinion he said:

“Judgment of State Supreme Court against navigability in Illinois vs. present defendant, obviously rendered on record vitally differing in facts from the record here, as to actual use of stream for fur trade and travel by customary mode at time of use. Therefore, that judgment not persuasive, it appearing from court’s opinion to have been based on the absence of evidence from that record as to such use, which evidence is present here.”

It cannot be understood how the trial judge came to this conclusion unless it be that because more than three and a half years had elapsed from the time he took the case under advisement and the time when he decided it, his memory was not clear as to the state of the record.

The fact is that what the trial court referred to as additional instances of “actual use,” were almost all records of efforts to use the river which resulted in failure.

The Court of Appeals said:

"The difference in the records in the two cases would not, perhaps, warrant a different conclusion, although the evidence here is somewhat stronger in favor of navigability than in that case." (p. 804.)

The reason why the Court of Appeals came to a different conclusion from that arrived at by the Supreme Court of Illinois is very evident. The latter court rejected the "floatage" definition of navigable waterways of the United States and the Court of Appeals accepted it. The Court of Appeals frankly admitted that it took "a different view as to the force and effect of the historical accounts of the early use of the river."

Some eighty witnesses were examined in the State case whose testimony was read, and became part of the record, in the instant case. But eighteen witnesses testified in this case who did not testify in the former, nearly all of whom were engineers, experts or historians who were put on the stand to draw conclusions from the historical evidence, which it was the business of the court to draw. We will deal with the testimony of such witnesses briefly later. Our present purpose is to show that the experience of explorers and traders in pre-settlement times proved that the river was not navigable even for their frail craft, and that the trial judge was wholly mistaken when he said that the record in the State case differed vitally from the record in the instant case "*as to actual use of the stream for fur trade and travel*," and the Court of Appeals was also in error in saying that the evidence in the instant case was somewhat stronger.

The abstract of the record in the State case contained over three thousand printed pages. A reference to the opinion (241 Ill., 290), will convince the Court, we think, that the Supreme Court of Illinois gave very careful consideration to that record and to a study of the early use of the river.

OUR TASK IN THIS PARTICULAR WILL BE TO REFER TO ALL SUCH EVIDENCE OF ACTUAL USE AS APPEARS IN THE RECORD IN THE INSTANT CASE WHICH WAS NOT CONTAINED IN THE RECORD IN THE STATE'S CASE. It very strongly corroborates LaSalle's characterization of the river as written by him in 1682:

"in the summer there is no water at all in the DesPlaines and Illinois as far down as Fort St. Louis (Starved Rock), where the navigation of the Illinois River begins at this season. (p. 295.) * * * Navigation would be only for a short time, at most for fifteen or twenty days each year, after which there is no longer any water. * * * the waters are always drained in the month of March, so that it would be easier to transport the goods from Ft. St. Louis to the Lake by land by making use of horses, which it is easy to have, there being numbers among the savages." (p. 35.)

These additional instances are as follows:

Tonti, LaSalle's lieutenant, in November or December, 1680, undertook a trip from Starved Rock to Lake Michigan in a canoe. (pp. 30, 31.) Somewhere on the trip the canoe was abandoned, just where does not appear. Parkman, the historian, puts this on the DesPlaines River. How much of the trip was made overland is not shown, but the accounts of Joutel (pp. 43, 45, 214, 1533, 1740-44, 1922, 1923), a companion of LaSalle, Charlevoix (pp. 58, 59, 1187, 1189, 1407, 1408), Hubbard (pp. 119-123, 219-222, 303, 1198, 1199, 1509-1515), Schoolcraft (pp. 233, 237, 1191-1193, 1462, 1568), Graham & Phillips (p. 1403), LaSalle (p. 295), St. Cosme (pp. 49, 50, 1567, 1360), and others, indicate that ordinarily it was necessary to carry the canoe a large portion, if not all, the way from the mouth of the DesPlaines to Chicago.

In 1682 Tonti came in a canoe to Starved Rock and was compelled to abandon it, and walked on land to Lake Michigan, forty leagues from there. (Abst., 1737-1738.)

In 1687 Joutel and his party made a land passage of 40 leagues from the Illinois River to Chicago *en route* to Mackinac, because there was no water in the river. Arrived at Chicago, they embarked in canoes of three men who had arrived from Mackinac on their way to Starved Rock and who had left their canoes and goods at Chicago, because there was no water in the river. Joutel's party failed in their attempted journey, turned back, left the canoes at Chicago and returned to Starved Rock on foot. (Abst., 1741-1743.)

In March, 1688, Joutel again came from the same point to Chicago. This was the time of spring flood and the canoes were pulled with great difficulty, the men walking in the water much of the way, and dragging their canoe. (Abst., 43-45, 1533-1534.)

Charlevoix, in 1721, planned to use the Chicago- Des-Plaines route, but "being informed that at this season of the year there is not water sufficient for a canoe" he took the route by the St. Joseph and Kankakee involving a journey greater by some 200 miles than that from Chicago direct to the Illinois. (Abst., 58.)

Kennedy in 1773 tried to ascend to the head waters of the Illinois in a boat of three feet draft. He and his party were compelled to leave it some 60 miles below the mouth of the DesPlaines because the water was so low that they could get no farther with their boat, and they proceeded by land. (Abst., 241-242, 1172.)

Hennepin, who accompanied LaSalle in 1679 and 1680, wrote that the "desPlaines River is not navigable for 40 leagues except for canoes which have hardly enough water in the summer time." (Abst., 38-39.)

LaHontan, in April, 1689, reported that having arrived at the village of the Illini, to lessen the drudgery of a great land carriage of 12 leagues, he engaged 400 men

to transport his baggage from the Illinois River to Lake Michigan, which was done in four days. (Abst., 218-219.)

One Tanner, in 1819, journeyed from St. Louis to Chicago. Part of the way he used a Mackinac boat; but his narrative says:

“The current of the Mississippi below Missouri soon convinced me that my large and heavy boat was not well adapted to the nature of my undertaking, and at portage DeSioux I left it. From this place I proceeded in a small canoe with two men, to the head of the Illinois river, thence to Chicago.” (Abst., 3253-3254.)

Tanner made a return trip in 1820, and his necessary portage was 120 miles from Chicago to the Illinois River. Arrived at Chicago he found a Frenchman who had just carried boats by wagon across the portage. Tanner says:

“Though his horses were now much worn out from the long journey from which he had returned, he agreed to take me and my canoe sixty miles, and if his horses could hold out, the whole one hundred and twenty, which was, at the present stage of the water, the length of the portage.” (Abst., 3255.)

At the end of sixty miles the horses gave out and Tanner attempted to put the canoe in the water, not to ride in it, but to drag it, but after three miles he found this method so slow and laborious that he engaged an Indian to take his baggage and his children on horses sixty miles farther. (Abst., 3255-3256.)

In 1822 he returned up the Illinois, but at about Peoria he left his canoe and took a horse to Chicago. (Abst., 3256a.)

Childs made a trip from St. Louis to Lake Michigan in 1821 in a canoe paddled by two men. It was in the spring of the year, at a time of great rains, when the streams overflowed their banks and the country was flooded. The flood was so extensive that he did not know when he had reached the portage, so he left the De-

Plaines and traveled in his canoe across country until he found the current of the Chicago River. (Abst., 1166, 697.)

Schoolcraft in 1821 came up the Illinois in a canoe as far as Starved Rock. The difficulties of navigation were such that his party relinquished the design of proceeding any farther by water, but made their journey to Chicago on horses. He referred in his narrative of his trip, to the "error of those who have supposed that a canal of only eight or ten miles would be necessary to provide navigation between Lake Michigan and the Illinois" (p. 236), stating that in their journey to Chicago they had seen the channel in the river at a sufficient number of places to determine that it has several long and formidable rapids which completely intercept navigation at this sultry season; "a remark that has been confirmed by meeting several traders on the plains who had transported their goods and boats in carts from Chicago Creek, and who informed us they thought it practicable to enter the Illinois at Mt. Joliet. This would lengthen the portage to about 30 miles, but it has been perceived that we experienced difficulties far below this last mentioned point." (Abst., 235.)

Tousey in 1823 went through that country on horseback, and he wrote:

"For many years I have felt a most anxious desire to see the country between Chicago and the Illinois (river), where it has generally been, ignorantly, supposed that only a small sum would be wanting to open a communication between them. By traveling on horseback through the country and down the Illinois, I have conceived a different and more exalted opinion of this communication, and of the country than I had before, while I am convinced that it will be attended with a much greater expense to open it than I had supposed." (Abst., 1190.)

In 1823 a Lieut. Hobson told William H. Keating that he had traveled the DesPlaines River with ease in a boat loaded with lead and flour. (Abst., 135-136)

In 1825 or 1827—the date is uncertain—one Fom came up from the Illinois in a canoe, and he merely stated that

“We paddled along until we came to the Des Plaines river, from which we passed into a large slough or lake that must have led us into a branch of the Chicago river, for we followed a stream that brought up opposite Ft. Dearborn.” (Abst., 137.)

Furman in the spring of 1829—the period of freshets—paddled a canoe down the river. (Abst., 148-149.)

In his description of his trip he says that “during the spring floods a considerable lake is formed.”

There is a record that one Galloway journeyed with his family and possessions in a dugout made from a black walnut tree from Chicago to a home established by him somewhere on the Illinois. The story as told in 1880 by his daughter says that he took advantage of the usual spring freshets. (Abst., 1702.)

WITH THE EXCEPTION OF THE USE, OR ATTEMPTED USE, OF THE RIVER BY THE AMERICAN FUR TRADE COMPANY, THE ABOVE CONSTITUTE ALL THE FACTS “AS TO ACTUAL USE OF STREAM FOR FUR TRADE AND TRAVEL BY CUSTOMARY MODE AT TIME OF USE” WHICH WERE NOT IN EVIDENCE IN THE STANLEY CASE AND REVIEWED BY THE SUPREME COURT OF THE UNITED STATES. IT WILL BE NOTED THAT IN NONE OF THESE INSTANCES, EXCEPT THE STATEMENT OF HOBSON, DOES IT APPEAR THAT THOSE PERSONS WERE CARRYING MERCHANDISE OF ANY SORT, AND THAT THEY WERE TRIPS IN CANOES, EXCEPT THAT ONE WAS IN A DUGOUT.

It will be further noticed that there is but one instance as disclosed by this additional evidence, where any use whatever was made of the river before the passage

the Ordinance and the early Acts of Congress. That was in 1688, when Joutel's men dragged their canoe through the river at time of flood. In this one narrative is found the only basis for the trial judge's conclusion that the decision of the Supreme Court of Illinois was not even persuasive, because "obviously rendered on a record differing in facts from record here as to actual use of stream for trade and travel by customary mode at time of use."

In the above discussion of the actual attempts to use the river shown in the record, we have deferred the accounts left by Gurdon S. Hubbard. Hubbard was connected with the American Fur Company, and that company endeavored to make practical use of the DesPlaines River in the fur trade, some years after the latest of the early legislation on which the trial court relied. No other reference in this voluminous record tends to show any attempt to make any regular use of it as a mode of trade or travel. All of the other material upon which this case is attempted to be built up, relates to instances of individuals endeavoring by canoes or other small boats, usually unsuccessfully, and at long intervals, to make some use of the river.

Hubbard first came to Chicago September 30, 1818, in the employ of the American Fur Company. His narrative shows that for about six years, from 1818 to 1824, some use was made of the DesPlaines River by the traders of that company. The descriptions which Hubbard gives of those trips serve but to confirm all the other evidence going to show that the possible use of the river was "temporary, precarious and unprofitable." Such use, as is said in *Harrison v. Fite*, 148 Fed., 781 (C. C. A., 8th Circuit), is not sufficient to show navigability.

Hubbard's narrative discloses that during the time he was engaged as a subordinate employee, he urged upon

the superintendent of the American Fur Company the abandoning of the attempt to use the DesPlaines River at all, and that when he himself became superintendent in 1822, he did abandon it altogether, in order to avoid "the long, tedious and difficult passage through Mud Lake into and upon the DesPlaines." One round trip was made each year, the down trip being in the high water of the fall, and the return trip in the high water of the spring. Once Hubbard took the long route around by the St. Joseph River to the Kankakee River to reach the posts on the Illinois, one reason he gives being to avoid "the delays and hardships of the old route through Mud Lake and the DesPlaines." (p. 223.) In places on the DesPlaines the boats were unloaded and the goods carried on the backs of the men over shallow places, and the boats passed over by means of rollers under them until the Illinois River was reached. (pp. 120, 123.) At times the water in the river was so low that it could be crossed on foot without wetting the skin of the feet. (p. 221.)

Hubbard says that the superintendent, Deschamps, having resigned, he was appointed to succeed him; and proceeds:

"I now determined to carry out a project which I had long urged upon Mr. Deschamps, but without success: that of unloading the boats upon their arrival at Chicago from Mackinaw and scuttling them in the slough to prevent their loss by prairie fire until they were needed to reload with furs for the return voyage. The goods and furs I proposed to transport to and from the Indian hunting grounds on pack horses. *In this manner the long, tedious and difficult passage through Mud Lake into and down the DesPlaines River would be avoided, and the goods taken directly to the Indians at their hunting grounds, instead of having to be carried in pack on the backs of men.*" (Abst., 221.)

It is interesting to note that the first white man engaged in trade in this territory, and the last man who ever attempted to use the DesPlaines for any purposes of trade, came to precisely the same conclusion. For LaSalle, writing in 1682, said:

“The Chicago (DesPlaines) River is not even navigable for canoes, except after this flood. The waters are always drained in the month of March, so that it will be easier to transport the goods by land from Port St. Louis to the Lake, making use of horses, which it is easy to procure there.” (Abst., 35.)

He further said that that river “does not have any water most of the year.” (Abst., 36.)

e.

THE OFFICIAL RECORDS SHOW THAT THE DESPLAINES RIVER HAS ALWAYS BEEN CLASSED BY THE UNITED STATES AS NON-NAVIGABLE.

The opinion expressed by the War Department when the plans of the dam in question here were submitted to it, that the DesPlaines was not navigable, was in accord with the attitude of the Government toward that stream from the time of the earliest settlement, as is shown by the official records.

Graham & Phillips, in a report of the Department of War dated December 28, 1819, to the House of Representatives upon the practicability of uniting by a canal the waters of the river and the waters of Lake Michigan, among other things said:

“On opening the canal, however, two difficulties would be experienced:

1st. The Plein (DesPlaines) would be found to be above the level of the canal; its water, of course, would be diverted from its natural channel, and pass by the canal into the lake.

2nd. *Supposing that evil remedied by a lock to*

lift vessels into the Plein, yet the Plein, during half of the year, does not contain water enough to float a boat, AND SO COULD NOT BECOME USEFUL AS A NATIONAL HIGHWAY." (Abst., 115.)

In the same report, commenting upon the varying length of the portage at different seasons of the year, Graham & Phillips said that at one season

"there was a portage of fifty miles, from the mouth of the Plein to the lake; over which there is a well beaten wagon road, and boats and their loads are hauled by oxen and vehicles kept for that purpose by the French settlers at the Chicago." (Abst., 116.)

This accords with the narrative of Tanner, *supra*.

Gen. James H. Wilson, in a report to the Secretary of War dated December 17, 1867, upon a survey to prepare plans and estimates for a system of navigation by way of the Illinois River between the Mississippi and Lake Michigan, speaking of the DesPlaines, said:

"The river itself, except in floods, is very shallow, being often reduced in dry seasons to a mere brook, discharging less than 1,000 cubic feet of water per minute." (Abst., 161.)

He further stated that

"The DesPlaines in low water contributes a comparatively inconsequent quantity to its volume (the volume of the Illinois). The Kankakee supplies water sufficient to make a good slack-water navigation. The DesPlaines of itself, does not." (Abst., 2844.)

General Wilson made a report dated February 15, 1867, on a survey of the Illinois River, which report, among other things, said:

"The practical conclusion from the foregoing statement is that a method of improvement by feeding from Lake Michigan as a reservoir, is feasible between LaSalle and Grafton, but above that point it will be necessary to employ locks and dams, and small sections of canal at Lockport and Joliet and Marseilles Rapids." (Abst., 2396.)

Major Benyaurd, in a report dated September 2, 1882, concerning a waterway between Joliet and LaSalle, said:

"It is evident, after consideration, that the only feasible plan to render the stream navigable is to slackwater the whole distance." (Abst., 655.)

A significant feature of this report was the recognition by the engineers that, because the stream was not, in its natural condition, navigable, the Government would have to pay for lands affected by any such improvement to make it navigable. They said:

"Certain lowlands will necessarily be submerged, * * * very little of it, however, is of any considerable value, and can very easily be estimated for * * *." (Abst., 655.)

The same suggestion occurs in the Ernst report of 1905, shortly to be mentioned.

In the Barlow report to the War Department dated November 18, 1900, of a survey for the improvement of the upper Illinois River and lower DesPlaines River, with a view to the extension of navigation from the Illinois River to Lake Michigan," appears the following:

"While the upper Illinois and Des Plaines Rivers are at present nonnavigable, the commerce of the Illinois and Michigan Canal which has been constructed in the valleys of these rivers, may be taken to represent the present commerce of such a route." (Abst., 2855.)

The Barlow report recommended that the bed of the Illinois River be improved and used from Marseilles to the mouth of the Kankakee, "thence by enlarging the Illinois and Michigan Canal to the Joliet basin, 18.3 miles." (Abst., 2855-2856.) This cut out entirely the portion of the DesPlaines River in which appellants' dam was to be located.

The Ernst Board of United States Engineers in 1905 recommended an improvement of the DesPlaines and

upper Illinois by locks and dams, with canals, however, from Dam No. 1 at Joliet to the head of Lake Joliet, and a canal at Marseilles. In that report the rights of the owners—and especially of water power owners—to be compensated, were expressly recognized. Under the heading “Vested Rights” reference was made to the value of water power rights, and the report said:

“The plan submitted is not designed to develop water power, but there will probably be no difficulty in modifying it so as to conform to such development, *if those who are to benefit thereby, will co-operate with the Government.* They should pay the cost of the dams and the damage from flowage, which is no more than they would be compelled to do if the Government made no improvement.” (Abst., 2857.) (Italics ours.)

This clearly indicates,—as indeed, does the whole report,—that the DesPlaines was not navigable, for if navigable, the Government was not under obligation to consider that the property owners had a vested right to maintain dams obstructing commerce, without the consent of Congress.

f.

THE REPORT OF THE ENGINEERS EMPLOYED BY THE STATE OF ILLINOIS IN CONNECTION WITH THE LAYING OUT OF THE ILLINOIS AND MICHIGAN CANAL, SHOW THAT THE DES-PLAINES WAS NOT ONLY NOT NAVIGABLE, BUT COULD NOT FURNISH SUFFICIENT WATER TO SUPPLY A NAVIGABLE CANAL.

The earliest report of the Canal Commissioners was dated January 3, 1825, and it stated that neither the Illinois, above the mouth of the Little Vermilion, nor the DesPlaines, was navigable in low stages of water. (Abst., 2824.)

It is noteworthy that this declaration, was made nearly

a century ago, and had reference to navigation as then carried on, and was but three years after the last attempt of the American Fur Company to use the DesPlaines at times of flood in spring and fall. At that time, as the report shows, the navigable waters of the Illinois River and Lake Michigan were "remote from the inhabited parts of this state." (p. 2823.)

Mr. Bucklin, an engineer employed by the canal commissioners, in a report dated January 21, 1833, said:

"The River DesPlaines when low, affords a very inconsiderable quantity of water." (p. 2830.)

In another report, after stating that the Calumet (Calumet) could safely be relied upon as furnishing 320,000 cubic feet per hour as its minimum discharge, and that an additional supply of 102,400 cubic feet per hour would be required for the canal, said:

"It has been also proposed to effect a water communication between the lake and the Illinois River by means of dams and locks in the DesPlaines, forming a still water navigation. Knowing the minimum discharge of this river, the impracticability of this scheme is so evident that the subject is here noticed more as a matter of form, than with any expectation of rendering it clearer. It will be recollected that the quantity of water provided for the passage of 96 boats over the summit level every 24 hours in the canal, is 86,400 cubic feet per hour. * * * *The minimum discharge of the River DesPlaines is only 60,000 cubic feet per hour. Of course, it is not competent to supply even the lockage * * * without taking into consideration the loss by evaporation and leakage, which would alone consume at least seven times the quantity of water discharged by the River DesPlaines at its lowest stage.*" (pp. 2831-2832.)

In 1837 Benjamin Wright, an eminent engineer, was appointed by the Board of Canal Commissioners to examine the route of the canal as then established, with a

view to ascertaining whether there was a sufficient quantity of water within the legitimate authority of the State of Illinois to supply a canal of the dimensions of the one then contemplated upon the summit level of the line of the canal. Mr. Wright reported to the Board of Commissioners October 23, 1837, saying (Abst., 2835):

“The DesPlaines River was not in a proper situation to gauge, as there had been copious rains; I, therefore, take the former measurements of the United States Engineers, as stated in the reports of the Canal Committee, at 54,800 cubic feet per hour.”

The report then showed that when the canal was in operation it would require not less than 500,000 cubic feet of water per hour, and he continued:

“These premises being admitted, we have to look for 445,200 cubic feet of water per hour more than the DesPlaines gives us at low water.” (Abst., 2835.)

In the report of the Canal Commissioners to the General Assembly in July, 1837, they state (Abst., 2051):

“The past dry seasons rendered the measuring of the DesPlaines almost unnecessary, since for nearly four months the tightest dam that could be erected, would not, at the point for taking out the feeder, have saved water enough to propel a single pair of ordinary millstones.”

Lyman E. Cooley, the chief expert witness for the Government, in a report to the Internal Improvement Commission of Illinois to Governor Deneen, February, 1907, said:

“From the end of the twelve-mile level to Lake Joliet was seventeen miles,—a mere surface stream over the rock bed—with a steep declivity over the lower half of the distance descending to a level of 76.5 feet below Lake Michigan.” (Abst., 1938.)

In the same report he said:

“The DesPlaines River practically goes dry above Joliet.” (Abst., 1938.)

In a work entitled, "Lakes to Gulf Waterway," written by Mr. Cooley in 1891, referring to the DesPlaines River, he said:

"The record shows that about one-half of all notable rises in fifty-six years, have occurred at the spring break-up, when the river could not be navigated on account of ice, and that floods which have occurred at other times of a height of fourteen feet and over, have not for fifty-six years, averaged three days out of banks, and probably for one-half of this time, not above fourteen feet, or over the limit of 30,000 to 35,000, cubic feet per second, discharge, which is stated as the navigable limit in the above extracts * * *.

The long low-water period, and the extremely small volume of flow at such times, makes it necessary to contemplate the full depth to be relied upon as available for navigation, the same as for the Chicago divide; and also, to use water from Lake Michigan, even for an exclusively slack-water scheme of small proportions. The present small canal has always had to rely on this source down as far as the Kankakee, and even below this point, the natural supply may, at times, be quite inadequate for any considerable commerce. The high water period is altogether too brief and uncertain to possess any availability for navigation greater than will be due to the minimum depths which the project contemplates." (Abst., 2031-2032.)

Isham Randolph, who was chief engineer of the Sanitary District of Chicago, and who presented to the War Department the protest against the building of the dam in question, stated in one of his reports that the entire low-water discharge of the DesPlaines River could be taken through a six-inch pipe. (Abst., 1075, 2849.)

Jacob A. Harmon, in a report of the Illinois State Board of Health, dated 1901, said:

"The DesPlaines River at Riverside, a few miles above Joliet, goes entirely dry at that point nearly every fall, and for days and weeks at a time there is no appreciable flow. * * * Practically all of the

flow of the DesPlaines River as it reaches the Illinois, is therefore, during dry weather, Chicago sewage." (Abst., 2817-2818.)

There was also introduced in evidence in this case and in the State case, a chart of certain gauge readings at Riverside which is of the utmost importance as showing the condition of the river in a state of nature, because these readings were taken at a point above that where the waters of Lake Michigan were conveyed into the DesPlaines by the Illinois and Michigan Canal and the Sanitary District Canal. We show elsewhere that the Court of Appeals failed utterly to understand the significance of these gauge readings.

The Supreme Court of Illinois refers to this evidence as follows:

"A chart showing the gauge readings at Riverside, a point twenty-eight miles above Joliet, shows the number of days in each year during which the river was dry at this point, which indicates that there were from twenty-four days in 1890 to two hundred and thirteen days in 1895 during which the river was dry at this point. This chart also shows the number of days during each of these years when there was a discharge of less than six inches of water at Riverside, the result of which is, totaling the number of dry days and the days showing less than a six-inch discharge, that there were from one hundred and twenty days in 1888 to three hundred days in 1901 when the river was either dry or showed less than six inches of water at Riverside. The depth of the river during the balance of the year is not shown on this chart. These gauge readings also show that the dry or low periods did not occur during the same time in each year. Every month in the year is represented several times during the years covered by this chart, from which the conclusion is drawn that there were no regular periods when a given stage of water could be safely expected.

We refer to the readings on the Riverside gauge,

not because of their bearing on the question of navigability, at that point, but for the reason that they tend to show the natural volume of water in the channel above the points where the volume is increased by the additions made by the Illinois and Michigan Canal and the drainage channel, which added from 250,000 to 400,000 cubic feet of water per minute to the river below the point of connection."

People v. Economy Light & Power Co., 241 Ill., 323-324.

g.

TESTIMONY OF EXPERTS AS TO NAVIGABILITY OF THE
DESPLAINES.

Expert witnesses were called on behalf of both parties in the State case, and their testimony was introduced in the instant case. Robert Moore, former president of the American Society of Civil Engineers, a member of the Board of Engineers planned for the United States the deep waterway channel in the Mississippi known as the Southwest Pass, which has now a greater channel than the Eads Jetties. (Abst., 2601, 2605, 2606.)

L. L. Wheeler was for many years in the employ of the United States government in connection with its waterways, and had charge of the construction of the Hennepin Canal, and also of the survey of the DesPlaines River for the United States. (p. 2683.)

Thomas T. Johnson devised the methods by which the Chicago Drainage Canal was afterwards dimensioned, and he conducted the measurements of the flow of the DesPlaines River. (Abst., 2733.)

These witnesses all testified that the river was not navigable.

In addition, nine expert navigators of large experience testified to the same effect. One of these was the

president of the Anchor Line running from St. Louis to New Orleans, Isaac N. Mason (p. 2679), another William P. Grey (p. 2769), whose exploits in swift water steamboating upon the Snake River, are probably unparalleled in the history of the country.

It was our contention in the State case, however, and it is our contention now, that expert evidence as to navigability is of but little value as against the significance of the fact that "no use for purposes of commerce has ever been made of the river."

The Supreme Court of the State of Illinois in the Economy Light & Power Company case, 241 Ill., 336 said:

"A large number of witnesses testified, some from personal observation, and others as experts upon this issue. As might be expected, these witnesses testified to opposite opinions in regard to the navigability of this river. It is not practicable nor desirable to discuss this evidence in detail. Whatever may be thought of the preponderance of it one way or the other, it can have but little weight as against the uncontroverted fact that the river has never been used as a public highway for commerce."

In the present case the United States introduced four additional experts. Not one of them testified that the DesPlaines was a navigable stream within the definition laid down by the authorities.

Montgomery Meigs said that according to his definition of a navigable stream, any brook up or down which a boat drawing six inches of water, could be forced, is a navigable stream. (p. 876.) The river having been described to him in a hypothetical question (pp. 872-873), he said that in his judgment it was not capable of being used for purposes of profitable navigation in the way in which commerce is usually carried on to-day. (p. 877.) And he further testified that as he saw it on the 28th of

December, 1910, he should say it was not capable of being profitably used for purposes of commerce under its then condition, and he admitted that it was only common sense to conclude that the river was not navigable if there was no evidence that, when there were no railroads, and in the spring of the year when the country was soft any settler living along its banks, ever came to Chicago by that river. (Abst., 880.)

Another witness called by the government was B. F. Thomas, who, with Meigs, made an inspection of the river on the same day, the afternoon of December 28, 1910. He judged from what he saw, that it was navigable. (p. 812.) He took no measurements of depths, he knew nothing of the conditions at the bottom as to bowlders, he did not know what the fall of the river was. He admitted that the river could not be navigated by steamboats, and that he had never seen gasoline boats that could climb slopes such as existed upon that river. (Abst., 838-839.)

The testimony of the other two Government experts is negligible.

h.

THE OPINION IN PEOPLE V. ECONOMY LIGHT & POWER COMPANY, 234 U. S., 497, INDICATES THAT THIS COURT DID NOT CONSIDER THAT THE ACT OF MARCH 3, 1899, APPLIED TO THE DESPLAINES RIVER.

The writ of error taken by the State of Illinois was dismissed for want of jurisdiction. In order to decide only the question of whether the State court had jurisdiction to enforce a Federal right, it is submitted that the opinion in that case could have been limited, after the statement of facts, to a few words found on page 524: "The State is not the instrument through which the jurisdiction can be exercised." But the court considered not

only whether a Federal right was asserted in the case below, but whether one existed.

We have above (p. 92) called attention to the references in that opinion to the submission of the plan of appellant's structure to the War Department, and to the conclusion which the court reached: "It is manifest, therefore, that the State has no right under Federal laws which it may assert for itself or on behalf of the citizens of the United States."

To properly interpret the opinion and to understand why this Court discussed certain questions in it, it seems to us necessary to have in mind that what this Court said about those questions was in direct response to positions taken by counsel for the State in their brief, and to the extensive abstract of which is reported in connection with the opinion. Counsel for the State insisted that a Federal right existed, because the DesPlaines was a stream which came within the scope of the Act of March 3, 1899, relying, among other things, upon the Ordinance of 1787 and the early Acts of Congress.

This Court disposed of the contention as to the Ordinance of 1787 in two ways, (1) by referring to the *Willmette Iron Bridge Co. v. Hatch*, 125 U. S., 1, which held that the Ordinance had no such effect as was sought to be given to it in this case, and (2) by stating that the fact of navigability having been decided against the State by the State court, there was no Federal right left to be reviewed.

This Court also took up the claim of counsel for the State that the Supreme Court of Illinois excluded from consideration the fact that by reason of the addition of water by the Sanitary District Canal, the DesPlaines had, as was claimed, become navigable. Replying to the contention of counsel that "If those public rights

created or protected by Federal law, this court has jurisdiction to reverse the judgment," this Court said:

"The inquiry immediately occurs, How did the so-called public right arise? From the mere addition of water to the river, or by the conditions upon which it was admitted?"

Further, it considered the claim that certain Acts of Congress appropriating money for a survey and estimates of cost for the improvement of the upper Illinois and lower DesPlaines Rivers in Illinois, was a recognition by Congress of the navigability of the river, and disposed of it as follows:

"The cited Acts are not appropriations for improvements undertaken, but for improvements which may be undertaken; not a jurisdiction exercised, but a jurisdiction to be exercised."

We submit that these observations by the Court, while not necessary to the decision that the case should be dismissed for want of jurisdiction—which conclusion resulted from the holding that the State could not assert a Federal right—indicate the opinion of this Court as to the effect of facts which are vital in the decision of the present case. In effect this Court said that not only did it have no jurisdiction over the case, but also that the United States had no jurisdiction over the Des-Plaines River.

POINT XII.

THE COURT OF APPEALS WAS LED INTO MANY ERRORS OF FACT, AS TO MOST OF WHICH, THERE WAS NO CONFLICT IN THE EVIDENCE.

The opinion contains many errors of fact. The Court is not called upon to weigh conflicting evidence as to most of these. In important particulars the Court of Appeals stated as facts, matters which were supported by no

evidence whatever but were in contradiction to all the evidence. Thus the Court says (256 Fed., 798):

"After the year 1848, when the Illinois and Michigan Canal was constructed, commerce that had formerly been carried on the DesPlaines River was carried on the canal."

In this statement the Court was misled by an assertion contained in the brief of counsel for appellant. This statement conflicts with the statement upon the same page as follows:

"The trial judge found, as the record shows, that there is no evidence of actual navigation within the memory of living men."

There were a number of "living men" who were witnesses in the State case and whose evidence was read in the instant case, who lived along the banks of the DesPlaines prior to 1848. Some of the testimony was introduced by appellant and other like testimony by appellee. None had ever seen any boat larger than a skiff or row-boat upon the river and none had ever seen a boat upon it engaged in carrying passengers, produce or merchandise of any kind. Nearly all said it was incapable of such use.

In the opinion of the Supreme Court of Illinois, upon precisely the same evidence as to the attempted use of the river prior to 1848, it was said:

"There is not in this entire record a well authenticated instance in which a boat engaged in commerce navigated the waters of the DesPlaines River."

a.

THE IMPLICATION IN THE FINDING OF THE COURT OF APPEALS THAT COMMERCE WAS CARRIED ON THE RIVER PRIOR TO 1848, WHICH WAS THEN SUPERSEDED BY THE OPENING, AND USE OF THE CANAL, IS CONTRARY TO ALL THE EVIDENCE ON THE SUBJECT.

Since we are undertaking to show that there is no evidence whatever upon which this finding of the Court can be sustained it will be necessary for us to refer to the testimony of every witness who resided along the banks of the river prior to 1848.

Franklin Collins came to Will County in 1833. He never saw or heard of boats carrying freight or merchandise on the DesPlaines River; there was no other way of getting produce to Chicago than by ox or horse teams, and he said "most emphatically" that in view of the difficulty in transporting merchandise and supplies to and from Chicago, if it had been possible to use the DesPlaines River it would have been used, and that, in his opinion, the only reason the river was not used was because it was not capable of being used. (Abst., 2586.)

George W. Read settled in Will County in 1829, and in 1833 he had seen a party going down the DesPlaines River singing and saying they were going to a warmer country, and that was the only boat, except skiffs, that he had ever seen. There were not many skiffs going up and down, only just what were used in Joliet *for the purpose of crossing the stream*. (p. 2104.) Read testified that the grain raised on his father's farm was taken to Chicago by ox teams, that the roads were full of teams going and coming. (Abst., 2105.)

Jeremiah Collins came to the vicinity of the DesPlaines in 1834. He never knew or heard of the river being navi-

gable, had never seen any navigation on the Illinois River along where his father's farm was, or ever heard of any above Ottawa, and did not think there could have been any without his knowing it. (Abst., 2649.)

John P. King lived in Will County since 1834. He never heard of any boat being operated on the DesPlaines River at any time, for commercial purposes. A skiff could not be navigated on that part of the river above Lake Joliet during flood seasons. He said "if you wanted to take the chance of getting drowned you could navigate a skiff down the stream during flood seasons. I would not want to do it." He could cross the river over the riffles or rapids without getting his feet wet perhaps two or three months in the driest part of the season, and for five or six months during the year the river would be at such a stage of water that it would be impossible to navigate rowboats up and down over the riffles without dragging the boats. (p. 2559.) That the water would be low at least nine months out of the year. This is corroborated by the readings of the Riverside gauge hereafter to be referred to.

John McCowan came to the DesPlaines in 1835 in a wagon from Chicago. He said there was no other available means of getting into that country at that time (p. 2593); that he had never seen or heard of boats plying the river carrying merchandise or passengers; that the only way of getting produce to Chicago was by team and that he did not think it possible for boats to have gone down the DesPlaines since 1835 *and up to the date of his testimony.* (p. 2592.)

Adam Comstock came to Joliet in 1836. He "never knew of any boats used in the DesPlaines River for purposes of commerce, such as carrying freight or passengers; never heard of any such boats before 1848 or after

wards." He further testified that a skiff would have to be pretty skillfully handled or it would be apt to capsize, and that he never knew of anyone rowing a skiff from its mouth up the river during the high water season. (p. 2562.) He also had crossed the river without getting his feet wet.

David Layton had lived on or near the DesPlaines River since 1837, coming there when he was nine years old. He had never seen any boats carrying freight or passengers, or used for commercial purposes, navigating the DesPlaines River at any place at any time; he had never heard of its being navigated; they could not come up by water any further than Ottawa before the canal, and they used to bring it from there by teams to Joliet, and merchandise was always brought between Chicago and Joliet by team. He himself, when fifteen years old, hauled wheat to Chicago. (Abst., 2553.)

John W. Taylor came to Illinois in 1837. He never saw any boats carry anything on the river. (Abst., 2276.)

G. H. Erhard was born in Joliet in 1838. He never saw boats used for commercial purposes except that he had seen rafts coming down the river. The rafts went to the Haven sawmill, near Joliet. He said that he had heard of merchandise being shipped on the river but he had no positive knowledge of any such transaction. (Abst., 2106-2108.)

George Alexander had lived in Will County since 1838. He had never seen any boats on the river carrying passengers or produce, and that nobody else had. (pp. 2487-2488.) That he had seen no boats except skiffs, and that, in the summertime, during ordinary stages of water, a well-loaded skiff could not go over the riffles. He also testified as to the stage route to La Salle.

Xavier Munch came to Will County in 1839. He never

saw any boats going up or down the river, except boats. (Abst., 2516.)

William S. Myers had lived on the river since 1820. When he came there he was twenty-six years of age. He testified that no boats used for commerce ever ran up or down that river, and that merchandise from St. Louis was brought to Ottawa by boat and thence to Lockport by wagon. (Abst., 2507.)

Harlow H. Spoor was born in 1820 and moved to Will County in 1844. He testified that he had heard of a particular circumstance related in a book called Woodruff's History of Will County on the Kankakee. The story as there told was that in 1834 some parties loaded a boat with oats, wheat and hay with the design of taking them to Chicago to supply the garrison stationed there; that the trip down the Kankakee was accomplished without accident or unusual trouble, but after entering the DesPlaines, near Treat's Island, the boat dipped water and so damaged the grain that they were obliged to unload and to dispose of their produce at that point. (pp. 2217, 2233.) If this tale were true it amounted only to tell that an attempt to come up the DesPlaines came to grief a little above its mouth. Spoor testified:

"I don't know that I ever heard of a boat going from Joliet to Chicago on the Des Plaines with grain or merchandise, that is not about their going through the whole length of it, only this circumstance about the boatload of grain I was telling you about. * *I don't recollect at the present time any other boat that I ever heard of ever attempting to go up or down the Des Plaines with merchandise.*"

Spoor himself disposed of the story that boats carrying grain went down the Des Plaines, for he testified that grain was hauled by wagon.

"I don't think they hauled it by boats, because they had no way of hauling them." (Abst., 2234.)

George F. Gurney knew the river from 1845. He had never heard of commerce being carried on the Des Plaines. There were riffles in the river which would break any boat. (Abst., 2508.)

Jacob Adler was familiar with the river before the canal commenced operation in 1848. He never saw a boat on the Des Plaines for commercial purposes. It was impossible for any boat to run up and down the river he said, giving his reasons. (p. 2538.) He had been on the river in a skiff, but in summer while the river was in its normal condition it was not possible to navigate a rowboat over the riffles; they got out and pulled it. (p. 2539.) He had never heard of any boats plying on the Des Plaines, transporting freight or passengers,—it would be impossible.

James Boyne came to Joliet in 1844 or 1845. He had never heard of any boats on the Des Plaines carrying passengers or freight. Produce could not come down the river because the river would not carry a boat. (p. 2521.) A skiff could not always be taken all the way up the river. (Abst., 2522.)

Lewis K. Stevens had lived in Joliet since 1836. He had never heard of any boats on the Des Plaines River used for commercial purposes. He said it would be an impossibility. (p. 2524.) Some seasons you would not know that the water run. You could walk over the rocks; it would seep through,—almost dry in places. Never saw any boats except little rowboats on the river. He described the dams and said that if there had been no dams it would have been impossible to have navigated the stream. (Abst., 2526, 2527.)

James C. Keen, born in 1824, came to Will County in

1843, coming to Chicago by boat and then by wagon Plainfield. Never knew and never heard of any boat the river used for commercial purposes, or of any merchandise or produce being carried on the river. (Abst. 2569.)

Enos Field came to Illinois in 1847; he came by boat up the Illinois to Peru, from there there were teamsters carrying freight by wagon to Chicago, and he never knew of any produce or freight carried on the Des Plaines or of any boat transporting merchandise or freight. (Abst. 2572.)

Urias Bowers came to Joliet in 1844, being then eleven years old. His business has been boating along the Illinois River and the Illinois and Michigan Canal. He never knew of any boats carrying freight or passengers on the river, nor of anything more than a skiff. (Abst., 2577.)

Oliver S. Chamberlain came to Will County in 1838 and never saw or heard of any boats bearing produce or freight of any kind upon the Des Plaines. (Abst., 2581.)

R. W. Killmer came to Joliet in 1844, being then twenty-two years old. There was no way of getting supplies or produce into that territory from Chicago except by teams. He never saw nor heard of any boats navigating the river. There were times when there was scarcely any water running over the riffles. It was his opinion that if the Des Plaines ever could have been used that it would have been used. (Abst., 2599.)

James G. Elwood was born in Lockport in 1839 and moved to Joliet in 1843. He never knew of any boats on the river except skiffs, and he said he would not venture to send any produce on the river by any boat.

adapted to commercial purposes. He boated and fished on the river but never took a boat up stream, as he never had any desire to go up against the current or the boulders. He had known the river at times to be so dry that no water was passing through it. (Abst., 2658, 2659.)

Samuel Gatons, a witness for the Government, came to Will County in 1844. He saw nothing on the river but a yawl boat, and that was when he was three and one-half years old. (Abst., 2272-2274.)

We have now referred to the testimony of every witness on each side who knew the Des Plaines prior to the opening of the canal in 1848, and none of them knew or had heard of commerce carried on the river.

b.

THERE IS NO EVIDENCE THAT IN EARLY DAYS BOATS OF THE DIMENSIONS GIVEN IN THE OPINION OF THE COURT OF APPEALS, WERE EVER USED ON THE DESPLAINES RIVER.

Another assertion of fact by the Court of Appeals which is without foundation in the record is the following—(256 Fed., 798):

“Large quantities of supplies of various kinds needed by the settlers in a new country were also transported over the Des Plaines during the same period in boats of the size and character then commonly used in river commerce; this transportation being carried on between Chicago and St. Louis and other points. Canoes of several tons burden were used; some were 35 feet long by 6 feet wide, some 33 feet long by 4½ feet wide, worked by paddles and occasionally a sail, and had a crew of eight men, carrying as much as 6,000 pounds of freight, as well as 1,000 pounds of provisions. Pirogues were manned by six or seven oars; the bateaux were larger than the pirogues; the Durham boats were heavy freight craft 60 feet long, 8 feet wide, 2 feet deep,

with a capacity of 15 tons, drawing 20 inches water."

There is not in the entire record a description of the dimensions of any boat used upon the Des Plaines River. In nearly every instance where boats were referred to they were canoes, and the record shows that they were light boats which could be picked up and carried for many miles. These dimensions of various kinds of boats were read into the record from various works but in no case was the quotation with reference to the use of boats on the DesPlaines. The description of pirogues was taken from the Century Dictionary and from the account of the journey of Lewis and Clark up the Missouri and down the Columbia. The Durham boats were, as Prof. Thwaites said—"of the sort that they navigated the Great Lakes with."

The only mention of Mackinaw boats in the record was in connection with the few seasonal trips made by the American Fur Company, which abandoned the use of the Des Plaines because of the great difficulties encountered, as pointed out in another portion of this brief. Thwaites expressly stated that he did not know what the draft of the boats used by Hubbard in the fur trade was (Abst., 498, 499.)

The entire record contains but one reference to a Durham boat; that appears in "Drown's Peoria," an almanac, dictionary and advertising medium of flimsiest character, in which it is stated that in 1825 one John Hambl exported produce from Peoria to Chicago, carrying it to the DesPlaines part way in keel boats and part in Durham boats, building a storehouse at the mouth of the Kankakee. This statement is highly improbable for many reasons. First, because there is no other instance in the whole record of the produce of the country being

carried up the upper Illinois or DesPlaines by boat; second, because the physical conditions made it impossible for boats of that character to pass up or down the river, third, because persons who settled in the neighborhood within a few years thereafter, never heard of such an event or of any storehouse said to have been built at the mouth of the Kankakee, and, lastly, because there was no settlement at Chicago at that time which could have justified such an undertaking. There were but nine people in Peoria in 1825 and but three or four families in Chicago. (Abst., 1820-22, 1930-1932.)

The garrison had been removed from Chicago in 1823. (Abst., 1471.) At the period in question there was produced in Chicago "an abundance of all the luxuries of farm, cornfield and dairy." The difficulty was how to dispose of the amount produced. (Abst., 1472.)

c.

THE COURT OF APPEALS ALSO ERRED IN THE FOLLOWING STATEMENT:

"COMMERCE OF THIS CHARACTER EXISTED UNTIL ABOUT THE YEAR 1825. AFTER THAT YEAR THE FUR TRADE, HAVING RECEDED TO THE INTERIOR PORTIONS OF ILLINOIS, WAS REACHED MORE GENERALLY BY HORSES."

The reason why the fur trade was reached by horses is clearly given by Hubbard, the superintendent of the American Fur Company, which alone at that time was carrying on that trade in a passage quoted *supra*. That reason was the same which caused La Salle, the first white man who ever traded in that country, to say that it would be better to use horses than to attempt the use of the DesPlaines. Prior to 1825 the fur trade was already in the interior portions of Illinois. There was no change in that particular at that

time. Hubbard gave up all attempts to use the Des Plaines in 1824.

d.

THE COURT OF APPEALS WAS IN ERROR AS TO THE ALLEGED USE OF THE DESPLAINES "FROM THE LATTER PART OF THE SEVENTEENTH CENTURY THROUGH THE FIRST THIRD OF THE NINETEENTH CENTURY."

The Court of Appeals (256 Fed., 797), in the paragraph entitled, "Use of DesPlaines River," says that "from the latter part of the Seventeenth Century through the first third of the Nineteenth Century men engaged in the fur trade passed up and down the Chicago and DesPlaines River in canoes and float boats very regularly. Fourteen specific instances of the use of the DesPlaines down to the year 1830 are shown in the evidence as follows:"

The court then lists the trips to and from Chicago which constituted these fourteen specific instances. Most of these trips were in light canoes, in the spring or fall floods, and were not made by persons engaged in the fur or any other trade. The trips referred to were as follows:

↔Up the river, Joliet and Marquette, 1673, light canoe. No actual evidence that the DesPlaines was used at all. (Abst., 1531-1532.)

Perrault, 1783. All that appears is that he was directed to 'pass by Chicago.' ↔

This did not mean that the DesPlaines was used by Perrault, for La Salle, who had occasion to reach the Illinois with more extensive trade than any other person went by the St. Joseph River passing Chicago (Abst., 279, 1601-1604), and Collot went to Chicago by way of the Calumet. (Abst., 88.)

Joutel, 1688. Joutel went to and from Lake Michigan on foot. He made two trips on land for

distance of thirty or forty leagues, and although having canoes, they did not use them because there was no water in the river. On a third trip the canoe was dragged through the water. (Abst., 1739-1744.)

Hubbard, 1819. In time of flood.

Child, 1821, in a light canoe, with no cargo. No month given but in a time of high water so that he crossed the DesPlaines to the Chicago River in his boat; probably at a time of spring flood.

Tonty, in 1680. As to which trip there is no evidence that it was made in a boat. (Abst., 33.)

La Salle, 1681. On foot. (Abst., 1609-32-33.) His destination was not Chicago but St. Joseph.

Fonda, 1825. In a light canoe. (Abst., 1701.)

The trips from Chicago, referred to by the Court of Appeals, were:

Membre, 1682, on the ice, a distance of 80 leagues.

St. Cosme, November, 1698. Eleven or twelve days consumed, with a portage of 17-1.2 leagues, which practically eliminated the DesPlaines River. (Abst., 49-50.)

Hubbard, 1818. Under great difficulties, pointed out in his narrative—the goods being unloaded and the boats being put on rollers. (Abst., 123.)

Marquette, 1674. In time of flood in a light canoe. Marquette himself speaks of the ease of making portages of 30 leagues carrying his canoe, which gives a very good idea of the character of the boats used. (Abst., 1461.)

Heward, 1790, in a Pirogue, in the spring floods at a period of extreme high water. He speaks of a portage along rapids. Some of his men after passing Joliet told him that because of the dangers they might not return with him. (Abst., 82.)

Furman, April, 1829. In a canoe—the prairie being flooded. (Abst., 1703.)

We submit that the fact ^{that} these are the only specific instances the court could find of actual use of the river in a period of one hundred and fifty years, rebuts its conclusion that during that period "men engaged in the fur

trade passed up and down the Chicago and DesPlaines Rivers in canoes and flat boats quite regularly."

The Court of Appeals proceeds to say:

"Many other trips made during the same period, not so well authenticated, are disclosed in the evidence."

This statement is without any support in the record ^{and} ~~not~~, with the exception of a trip by Cass in a light canoe (Abst., 1321), no reference was made to other trips. It is true, as the court says, that there are numerous historical references to the Chicago and Illinois route. It is also true that that was a general designation of the route from Lake Michigan to the Illinois River, and that practically the Desplaines often was not used at all in traversing that route. Much of the time the portage extended all the way from Chicago to points well down on the Illinois.

On the other hand, the record contains accounts of attempts to use the river which failed. We have elsewhere referred to the experiences of Schoolcraft, Kennedy, Tanner, Charlevoix, La Houtan, La Salle and Cosme, and the report of Graham and Philips.

We submit that in the light of these historical records and in view of the fact that in certain of the alleged specific instances of the use of the river listed by the Court of Appeals, the river was not used at all, and of the difficulties involved in other of the trips so referred to by it, the conclusion of the court that the stream was quite regularly used during the period mentioned by the court is without foundation in the record.

POINT XIII.

THE DESCRIPTION OF THE DESPLAINES CONTAINED IN THE OPINION OF THE COURT OF APPEALS IS TAKEN ALMOST BODILY FROM THE TESTIMONY OF LYMAN E. COOLEY. THAT TESTIMONY ITSELF IS FULL OF MANIFEST ERROR, AND IS LARGELY COOLEY'S OPINION OF WHAT THE RIVER WAS IN A STATE OF NATURE, NOT WHAT IT IS NOW. THAT OPINION WAS PURE CONJECTURE.

The chief engineering witness for the Government was Lyman E. Cooley, who admitted he had a deep personal interest in the result of the suit. (Abst., 669.) From 1875 he had devoted his time to the plan for a waterway joining Lake Michigan to the Gulf. (Abst., 670, 674.) He believed that the erection of the dam by the appellant was an obstruction to his cherished project, and he busied himself to procure the passage by the Illinois Legislature of the bill of December 6, 1907, recognizing the Des-Plaines and Illinois Rivers as navigable streams, and seeking to prevent obstructions being placed therein. That was aimed directly at the appellant. (Abst., 675.)

After its passage, Cooley, on behalf of the State of Illinois, swore, on December 30, 1907, to the information filed by the State against this appellant, and was employed by the State to assist its attorneys in the preparation and trial of the case.

From the beginning of that case to the end of the long trial he devoted nearly all of his time to it. (Abst., 675.) From the beginning of the present litigation he was very active in the preparation and trial, and was paid a *per diem* by the Government for his services.

His conclusions, as an engineering expert, had two aspects, first, as to navigable capacity of the river in a state of nature; second, as to its navigable

capacity in its condition after the construction of the Sanitary District canal. The true character of his work in attempting to depict the natural condition of the DesPlaines, was indicated when he compared it with the work of Cuvier in reproducing an extinct mammal, or Agassiz in reproducing a fish from bones that are left. (Abst., 608.) Those scientists had an advantage over Mr. Cooley; the subjects of their hypotheses were extinct,—the DesPlaines River is here, and it is possible to see wherein he ignored, or misinterpreted, known facts, and assumed others which are unknown, whereby his conclusion becomes a mere hypothesis, and not a reliable indication of the river as it was in a state of nature.

Moreover, his hypothetical reconstruction of the river as it was in its natural state, and his testimony as to his knowledge of it before the connection with the Sanitary District canal, has this further disadvantage. Cooley had been writing about the river for years before this controversy arose, and he had made a distinct record as to his opinion of it which supports entirely appellant's contention, and is in agreement with the conclusions of the engineers engaged for the construction of the Illinois and Michigan Canal, and the various reports of Government engineers. In 1901 he wrote a report by the Internal Improvement Commission of Illinois, and in 1906 he wrote "The Lakes to the Gulf Waterway." In that he described the DesPlaines from the end of the Twelve-Mile Level to Lake Joliet, *as a mere surface stream over the rock bed*, with a steep declivity over the lower half of the distance descending to a level of 76.5 feet below Lake Michigan (Abst., 1938); and said, "*The DesPlaines River practically goes dry above Joliet.*" Again, in 1891, he wrote:

"The Desplaines has been measured twice for low water; in 1887, 256 feet per minute, and in 1879, 339

feet per minute, both between Riverside and Lockport." He said, "at least sixty per cent of the low water volume passing Morris in 1887 came from Lake Michigan by the Illinois and Michigan canal, and probably one-half of the volume in ordinary low water years comes from this source." (Abst., 2031.)

It will be seen later that these statements are in direct conflict with his claims as to an assumed depletion of the river by diversion into the canal. It recognizes that we elsewhere show to have been the fact that the canal did not deplete but added materially to the volume of the river.

In another report Mr. Cooley says (Abst., 754, 755):

"The dry-weather flow, or low-water volume, is very small, as has already been inferred from the physical characteristics of the watershed. In 1887, Salt Creek was entirely dry at Fullersburg. The DesPlaines, at Riverside, reached a minimum of 4.27 feet per second (256 feet per minute), and for five months did not exceed 1,000 feet per minute. The stream has been known to be lower than this, but has never wholly run dry.

In 1879, a discharge taken by Mr. Matthewson at Romeo, four miles above Lockport, gave a volume of 5.65 cubic feet per second (339 feet per minute). The minimum volume at Riverside would not be increased, in fact, might be diminished, in passing through 'the twelve-mile level,' by evaporation and vegetation, in the run to Joliet. Three hundred feet per minute may be assumed as the mean extreme low water at Riverside and at Joliet, with a volume below 1,000 feet for several months of nearly every year."

Other statements of Cooley of like character are referred to elsewhere in this argument.

Mr. Cooley ignored, or was ignorant of, certain other authoritative scientific writings, which stated facts inconsistent with his testimony that there had been no artificial additions to the river.

Ossian Guthrie, in his work "The Great Lakes and Their Relations to the Lakes and Gulf's Waterway" gives a table of the operation of the Bridgeport pump pointing out that they added materially to the volume of the river. (Abst., 1045.)

Leverett, in his "Water Resources of Illinois," etc. said (Abst., 2050):

"Prof. Cooley reports that at Riverside in 1887, reached a minimum of 4.27 feet per second; and for five months did not exceed $16 \frac{2}{3}$ cubic feet per second. He estimates that for nearly every year the extreme low water flow at Riverside and Joliet reaches about 5 cubic feet per second."

Post and Paul, the engineers who made the first survey that was ever made of the route of the Illinois and Michigan Canal, found the discharge of the DesPlaines to be but 20 cubic feet per second. Dr. Howard, United States civil engineer, in 1829 found it to be but about 20 cubic feet per second, and engineers Harrison and Guibault in 1830 found it to be about 17 cubic feet per second. (Abst., 1071, 3085.)

Col. Wilson, Chief Engineer of the United States Army, in his report on the DesPlaines of December 17, 1860, said "*the river itself (the DesPlaines) except during floods, is very shallow, being often reduced in dry seasons to a mere brook discharging less than 1,000 cubic feet of water per minute.*" (Abst., 1072, 2843.)

William Gooding, chief engineer of the Illinois and Michigan Canal, in a report dated December 15, 1865 (Abst., 2865) says:

"DesPlaines River, Post and Paul, 1950, by Bucklin, 1000 per minute. * * * Calumet 5,333, DesPlaines 1000, Dupage 1655—7998 cubic feet per minute. * * *

Quantity of water in all these streams continues to diminish till the 1st of November, when the to

would be about 7,300 cubic feet per minute for all three rivers. The water necessary to supply the canal from Chicago to Marseilles is 9924 cubic feet per minute, or a deficiency of 2624 cubic feet per minute."

"The construction of a perfectly watertight dam at Joliet has enabled us to ascertain with precision the quantity of water flowing in the DesPlaines. This river has been nearly dried up; the measurement on the 20th of September showing 338 cubic feet and on the 21st of the same month 373 cubic feet per minute." (Abst., 3116.)

From these statements it is certain that Mr. Cooley was in error in stating that a considerable volume of water was to be found in the DesPlaines in a state of nature, and that it had been depleted by the changes in the river.

Cooley's estimate, incorporated by the Court of Appeals in its opinion, of the number of days when, in a state of nature, boats could pass over the divide between the DesPlaines and the Chicago, or down the DesPlaines River has no value, because it depends entirely upon the accuracy of Cooley's hypothetical reconstruction of the river as it was in a state of nature. It has to do with a laboratory, and not a real, river. He says he made his computations by taking into account the increase of the volume which would result from an increase of drainage area down the stream, and deductions in area from a state of nature, because of the drainage of certain swamps and the addition of certain other areas. He also took into account assumed deficiencies in rainfall and runoff, due to deforestation, and also the effects of inhabitation.

The fact that the depths are given with remarkable nicety of precision even to tenths of feet, discloses that they must have been premised either upon precise data

as to all hydraulic factors involved in the conditions during a state of nature, which is impossible, or on a very liberal assumption of those hydraulic factors, which latter is obviously the fact.

The liability to error in making computations of the volume of flow, is illustrated by the fact that the Sanitary District Channel, of practically uniform depth and width, and every hydraulic factor of which was supposed to have been precisely ascertained, was computed to carry 10,000 cubic feet per second. When it was completed according to the specifications upon which the computation was based, it had a flow of 14,000 cubic feet per second (Abst., 2066), and Mr. Cooley had charge of that matter. Consider then the absolute impossibility when the hydraulic factors are as uncertain as they are here, of computing the depths with any approximation of accuracy. The margin of variation between the depths given, and those which would be prohibitive of the navigation Cooley describes, is so small that his conclusion cannot be more than an interesting hypothesis. They are a matter not of feet, but of inches of depth.

One of the most important factors in his computation was his assumption of what certain flood levels over the divide between the Chicago and DesPlaines Rivers would probably have been had it remained in a state of nature. Yet he testified he had never seen a cross section of the original divide, and does not think one could make an accurate determination of a probable flood line in a state of nature, without a map showing the depth, and width of the country east of the divide and all the hydraulic elements therein. For his purposes he caused one Parry to make a drawing, called "Parry's Exhibit 2," wherein he assumes to depict these flood lines. But he also assumed the elevation of the original bottom, which was

the most important factor in determining the nature of the divide. (Abst., 691-693.) Parry said he "simply followed Mr. Cooley's instructions" in the making of it, and that the "probable flood line" of 1892 across the divide, "is not intended to be accurate." (Abst., 549.)

Again, the futility of attempting to predicate navigation upon a flood condition, is shown by the fact that according to Cooley's testimony the flood of 1892, when he says a steamboat could have passed over the divide had it remained in a state of nature, was at the line he computes only for one day (Abst., 695), and, as we have shown, in his writings he had stated that the floods, subsided with great rapidity. Again in connection with the flood of 1881, which Cooley used as an important factor in his computations, he could not recall who made the data from which he projected the elevation which that flood would have shown on the Riverside gauge. (Abst., 694.) He disclosed that, among others ~~the~~ factors lower down the river upon which he premised his upper volumes, he considered an amount of water, which he could not recall, used by the canal and mill wheels in Joliet. (Abst., 695-696.)

Mr. Woermann, who at the time of testifying was one of the highest salaried engineers employed by the United States Government, in referring to Parry's Exhibit 2, said: "the hydraulic elements which affect the volumes of discharge and elevation of the water surface are so indeterminate that it is impossible to determine the flood with any degree of accuracy." (Abst., 1085.) These floods passed very rapidly and have little, if any, significance on the problem of navigability. (Abst., 1086.)

One factor Cooley took into account was alleged deforestation above the Riverside gauge. As to the extent of

this he was in error and the Court of Appeals in its opinion accepted his error as a fact. He admitted that he had made no investigation to ascertain the fact. He said that one-half to one-third of the river basin was originally wooded area, of which 25 per cent had been removed. The original Government township maps of the DesPlaines Basin show that not to exceed 25 per cent of its area was wooded, and a large part of that wooded area still remains. (Abst., 1053-1054.) Further, Cooley did not consider the contributions to the flow of the river by sewage and drainage from the towns upon the upper DesPlaines, all of which discharge their run off into the DesPlaines (Abst., 700-701), and country drainage from areas which before inhabitation never discharged water into the river. (Abst., 1056.)

Cooley did not attempt to gauge the hydraulic effects of variations in width and declivities, and there is no authority in any existing profiles of actual soundings of the river, for the depths which he testified existed at the several volumes of flow.

Cooley also attempted to establish depths in a state of nature by inference from the low-water line of 1883. He used a map, "Cooley's Exhibit 2," purporting to depict the river, in profile, from Joliet to its mouth, and to show the three shallowest points at 2.6 feet, 2.2 feet and 1.25 feet. In 1883 the DesPlaines was not in a state of nature. Cooley contends that it was depleted by various artificial works which he enumerates. As a matter of fact the flow was materially increased beyond that which was maintained in a state of nature, by the contributions of the Illinois and Michigan Canal.

Depths shown in a profile indicate nothing as to other depths in the same cross section, except that there is no greater depth. Profiles depict the thalweg of the stream,

or line of greatest depth. They do not indicate a boat-able depth, and take no account of boulders and other obstructions, or the sinuosities of the thalweg. These facts were overlooked by the Court of Appeals when it referred to depths of the river. (Abst., 1085.)

POINT XIV.

ERRORS OF THE COURT OF APPEALS AS TO THE RIVERSIDE GAUGE. THE READINGS OF THAT GAUGE CLEARLY SHOWED, AS WAS POINTED OUT BY THE SUPREME COURT OF ILLINOIS, THAT THE DESPLAINES RIVER WAS NOT ONLY NOT NAVIGABLE, BUT THAT DURING THE SEASON OF NAVIGATION IT WAS FOR A CONSIDERABLE PORTION OF THE TIME PRACTICALLY DRY.

There appears in the opinion of the Court of Appeals (256 Fed., 795-796) a reference to the gauge record kept at Riverside, and to the conditions which prevailed at various stages of water shown by that gauge. We think no one reading it could fail to be misled, as that Court evidently was misled, as to the actual fact. The natural impression is that the Court was speaking of conditions now existing, when, in fact, all were conditions which Mr. Cooley, the witness upon whose testimony these findings were predicated, thought would have existed in a state of nature—had there been no drainage, deforestation or diversion of water from the river. Cooley was asked to consider “this divide in a state of nature, based upon the computation and examination of the volumes of water in the DesPlaines River and the topography of the Continental Divide, and then to say at what elevation on the Riverside gauge the water would have flowed over the Continental Divide.” (Abst., 581.) As we ^{have} ~~shall~~ show hereafter the height of the Continental Divide was a mere assumption.

Whatever it was, no boat has passed over it since 182 and that boat was a canoe in time of flood. The River side gauge readings, to which the Court refers, but the significance of which it clearly misunderstood, are among the best proofs that the stream in a state of nature was not navigable.

The gauge was established by Cooley himself in 1886 for the purpose of measuring the amount of water in the river. In order to a proper understanding of the readings of this gauge, it must be borne in mind that when it is said that the gauge registered a certain number of feet say for instance, 12.4 that does not mean that there would be that depth in the river. The measurements were not from the bed of the river, but from Chicago datum. The gauge was set in a pool where the water would stand around it, even if there was no flow in the river. (Abst. 2744.) *Until the gauge reads 11.4 feet there is no discharge into the DesPlaines River.* (Abst., 689-2744-5. Therefore, when any depths are mentioned above 11.4 the actual discharge into the river is the difference between that depth and 11.4. At and below a reading of 11.4 feet the river, except in pools, would be dry, so that one could walk across it without wetting the feet. (Abst. 2745.)

The real significance of these gauge readings appears in an analysis, and table, prepared by Mr. Woerman, the accuracy of which is not challenged (Abst., 1939, 1947) and from which it appears that in every year from 188 to 1910 where the gauge readings are complete, there were from 24 to 213 days *when there was no discharge whatever* in the river, and it further appears that there were each year from 120 to 300 *additional days* when there was a six-inch depth or less.

Cooley testified that, according to these gauge read

ings, the water would have flowed over the divide on an average of over seventy-three days a year, permitting boats drawing 15 inches of water to pass from the Chicago River into the DesPlaines. The first difficulty with this statement is that it is predicated upon Cooley's purely theoretical assumption of what the elevation of the divide was in a state of nature. Next, that the average flow throughout twenty-four years, was of no consequence because, according to Cooley and other witnesses, the river was subject to great floods, quickly receding, and at other times was practically dry, the dry season being summer, which was the natural period for navigation.

Cooley's table of average days of certain depths (Abst., 590, 961) has no value on the question of navigability, because it covers the entire year, and not the navigation season from April 1st to December 1st; and further the table takes no account of whether the days are consecutive or not. (Abst., 1066.)

For instance, the table shows 65 days in 1887 when the gauge reading was 13.8 or higher, but those days were scattered through several months. The period of 13.8, or over, began on January 23rd and continued until March 21st. Then the water was lower than 13.8 during the remainder of the year until December 8th, when there were six days with a reading of 13.8 or over. Then it was below 13.8 until December 20th, and it continued so for 5 days, so that all the days when it was 13.8 or over were outside of the season of navigation.

Cooley's table represents that in 1887 there were 88 days when the water stood at or above a reading of 13 feet at Riverside. This period began January 23rd and continued to March 25th. During the remainder of the year it was lower than 13.0 until December 7th, after which for the rest of that month it was 13.0 or higher,

so that all the days of 13.0, or higher, were outside the navigation season, except April 4th, when the reading was a trifle over 13.0.

On Cooley's table, 1887 is accredited with 20 days in which the reading was 11.85 or higher. 106 of these days occurred between January 23rd and May 8th. From May 8th to July 17th there were 69 days when the reading was below 11.85. From July 17th to August 4th there were 18 days of 11.85 or over, followed by nine days with a reading below 11.85. From August 14th to September 1st (19 days) it stood above 11.85. Then for 3 days it was below 11.85, and then from September 4th to the end of the year (118 days) above 11.85. From January 21st to 22nd and from June 15th to July 16th (54 days) the gauge showed no discharge—being below 11.4.

All of the 62 days the gauge showed for 1900 with a reading of 13.0 or over, occurred between February 29th and April 28th, inclusive. In 1904 there were 158 days when the gauge showed no flow at all, as follows: January, 19 days; June, 22 days; July, 30 days; August, 20 days; September, 26 days; October, 8 days; November, 8 days; December, 25 days. During 74 additional days the gauge showed less than 6 inches of water at Riverside: January, 4 days; February, 2 days; June, 7 days; August 8 days; September 2 days; October, 23 days; November, 22 days, and December, 6 days.

When the gauge showed no water passing Riverside ordinarily there would be no flow below Riverside, until the mouth of the Dupage River, from which there might be a flow of from 20 to 50 feet per second for a short period, due to rains.

POINT XV.

ERRORS OF THE COURT OF APPEALS AS TO CHANGES IN THE RIVER.

The Court of Appeals (256 Fed., 796) refers to "changes in DesPlaines River." What follows is practically the testimony of the witness Lyman E. Cooley, which is demonstrably full of errors in essential particulars. Its purport was that the volume of the river as it was in a state of nature, has been materially reduced by various causes. This was to overcome the obvious fact that it is not now, and has not in the memory of man, been capable of any sort of navigation.

The Court of Appeals, following Cooley, find the "first change of significance was due to the construction of the Illinois and Michigan Canal in 1848." The fact was established that below Joliet in the portion of the river where appellant's dam was being erected, the volume of the river was very materially increased by the opening of the canal.

The value to be attached to Cooley's assumption of depletion of the river by the construction of the Illinois and Michigan Canal, is indicated by his lack of knowledge of certain vital facts. He knew how much water was contributed from Lake Michigan to the DesPlaines, but he did not know how much water was needed for the canal where it left the river at Joliet. Manifestly so much of the contribution from Lake Michigan as did not go down the canal, passed down the channel of the DesPlaines below Joliet, over the site of the proposed dam, and into the Illinois River. Cooley knew that the contributions from Lake Michigan by the Deep Cut through the canal to the DesPlaines reached from 15,000 to 30,000 cubic feet per minute. (Abst., 706-707.) He did not know the

amount contributed by the Bridgeport lift wheel, which was a very considerable amount. (Abst., 704-2753.) (The Court of Appeals mentions this Bridgeport pump as one of the "interferences" with the natural volume of the river, evidently supposing that it pumped water out of DesPlaines. As a matter of fact it pumped water out of the Chicago River and into the canal whence it was discharged into the DesPlaines.) The amount needed for the canal below Joliet is variously stated from 2,800 cubic feet (Abst., 1047) per minute to 9,000 cubic feet per minute as a maximum. (Abst., 2753.) Therefore the volume of the DesPlaines River below must have been largely increased by the canal and the pumping works. Cooley did not know how much water the canal took out below Joliet, or what proportion of the waters contributed by the Deep Cut went past the mouth of the canal at Joliet, and thence down the DesPlaines, and what part was diverted by the canal (Abst., 707), and he did not know that five mills below the point where the canal left the river at Joliet, possessed rights to the uses of certain portions of the water that could not be diverted for use of the canal. (Abst., 2903-2904, 2906-2907, 2925.) One was Haven's Mill at Joliet, below the mouth of the canal, and four others were on the level of the canal within the City of Joliet, all of which operated by water drawn from the canal and discharged back into the DesPlaines. (Abst., 704-706.)

In *Druly v. Adams*, 102 Ill., 177, which was litigation concerning the right to use the water at the Haven mill, it appeared that there was a surplus contributed to the DesPlaines by the canal of 25,000 cubic feet per minute not needed for navigation upon the canal. (Abst., 2903.)

In certain works of which Cooley was the author, written sometime before the giving of his testimony, he stated

that the water in the river below Joliet was, for the most part, contributed by Lake Michigan, by means of the canal.

POINT XVI.

THE ACT OF THE GENERAL ASSEMBLY OF THE STATE OF ILLINOIS PROVIDING FOR THE CONSTRUCTION OF THE SANITARY DISTRICT CHANNEL WAS EXPRESSLY FRAMED TO PRESERVE AND PROTECT THE WATER POWER RIGHTS OF RIPARIAN OWNERS ALONG THE DESPLAINES.

We refer to this fact because in the briefs filed in the Court of Appeals, there was an attempt to inject into the case an element which had no proper place there. We cannot assume that the same attempt will not be made here.

Counsel for the Government sought to create the impression that Mr. Munroe undertook to acquire a water power where none had before existed, by taking advantage of the expenditure of some \$50,000,000, or more, on the part of the Sanitary District to increase the volume of water turned into the DesPlaines River. Two facts are important in connection with this claim: first, that a water power existed and was availed of by a dam erected in 1833 at the site of the proposed dam; second, that the Statute of Illinois, which permitted the creation of the Sanitary District channel, expressly provided for the protection of the private rights of the owners of all water powers upon the river.

Several water power dams at points below the junction of the Sanitary District with the DesPlaines existed from the earliest days of settlement. A summary of them is given at page 2084 of the abstract. It was, of course, known to the legislature when they passed the Act creating the Sanitary District, that these water powers

would be greatly increased and rendered more valuable by the addition of the waters of Lake Michigan. To preserve them to the owners, Section 7 of that Act, revised Statutes of Illinois, 1917, p. 418, provided as follows:

"In no case shall said Board (Board of Trustees of the Sanitary District) have any power to collect water after it passes beyond its own channel, ways, races or structures into a river or natural waterway or channel, or water power or dock situated on such river, or natural waterway or channel."

The water power in question here is far below the point where the water passed from the channel of the Sanitary District.

This purpose to preserve to the private owner the water-power rights was further emphasized and effected by Section 23 of that Act, in which appears the following:

"This Act shall not be construed to authorize injury or destruction of existing water power rights."

The legislature must have intended that the existing water powers which would become valuable in the modern sense should be preserved and protected. The language could refer to nothing else. And indeed it is a well known fact that the preservation of these water powers was debated, and thoroughly considered by the legislature, and that the provisions of the statute referred to were incorporated for the express purpose of protecting them. (pp. 2020-2023.)

The evidence shows, that Mr. Munroe had perfected financial arrangements for constructing the dam and power house before he had any negotiations with the Economy Light & Power Company. (p. 3182.) Associated with him in the enterprise was Frank G. Logan, a well known capitalist.

Counsel for the Government also suggested in their brief in the Court of Appeals, that Mr. Munroe obtained from the State whatever rights it might have had in connection with the water power at Dresden Heights through what they characterized as "frugal arrangements" with the trustees of the Illinois and Michigan Canal.

The decision of the Supreme Court in *State v. Economy Light & Power Company* makes it clear that the State had no rights in that connection, and that its ownership was only of the canal and its tow banks, and a very few acres of worthless lands that it had never been able to sell, and which Munroe bought at the price at which it had been carried for years on the books of the trustees. These contracts have been declared valid by the opinion of the Supreme Court of Illinois just referred to.

POINT XVII.

TESTIMONY OF HISTORICAL EXPERTS, AND PUBLICATIONS OFFERED IN EVIDENCE.

Charles W. Alvord, Reuben Gold Thwaites and Andrew McLaughlin, historians, were called by appellee to draw conclusions, from narratives, translations, and compilations which Alvord had collected. We do not deem it necessary to lengthen this brief by an analysis of their evidence. Those conclusions are of little value in determining the present issue; first, because the application of the Act of March 3, 1899, to the DesPlaines River does not depend upon such use as was made of it in primitive days; second because they testified to no instances of the use of the river which are not referred to in the opinion of the Court, which instances we have already discussed; and, lastly, because it is the province of the court and not of historical experts, to determine what inferences may properly be drawn from the evidence.

Thwaites and McLaughlin confined themselves to excerpts collected by Alvord, and Thwaites declined to be examined as to other matters. When he was asked by counsel for defendant if there was any significance in the fact that horses and wagons were used for the whole length of the road portage, from Lake Michigan to the Illinois, at a period before the settlement of the country, for the purpose of transporting goods and merchandise, Thwaites replied, "The Government did me the honor to ask my opinion relative to certain historical incidents. That is not among them, and I have not made a study of this wagon route."

He further said:

"My conclusion was based on the evidence which the Government submitted to me for my opinion."

McLaughlin said: "I made no very satisfactory study from the sources of the early travels in this country, the early explorers" (Abst., 337), and counsel for the Government objected to cross-examination of him as to excerpts which he had not examined. (Abst., 339.)

It is also to be observed that Thwaites' attention was called to but part of the evidence submitted by Alvord, and McLaughlin's to still less. The conclusions of Alvord and Thwaites are substantially the same. McLaughlin's is somewhat more conservative. Alvord said that it was his "opinion that from the latter part of the seventeenth century, through the first third of the nineteenth century, men engaged in the fur trade passed up and down the Chicago and DesPlaines Rivers in canoes and flat boats very regularly. * * * That the most active trade carried on on the two rivers falls between the period of 1783 and 1825, or thereabouts; that the traders found a very easy passageway by means of these rivers in the early spring; that during the time of drought, such as occurred in the summer or fall, the

passage was hard, that even then they forced their boats through the waterway, often being obliged, however, to carry their packages around the shoals and rapids."

Thwaites added to Alvord's conclusion the fact that the carriage varied greatly in length from season to season and from year to year, according to the stage of the water.

McLaughlin's opinion from such of the excerpts as were submitted to him, was that the river was used from the time of Charlevoix to 1825 with "apparently considerable frequency" as a route of trade and commerce, "with considerable ease" at some seasons, and that "it seemed to present some difficulty" at certain seasons. (Abst., 327.)

We submit that the records to which we have heretofore referred do not justify the conclusion that the Des Plaines River was used in the fur trade "very regularly," "quite regularly" or "with apparently considerable frequency" during the period mentioned.

Two experts on historical matters were called by the defendant. Any person who may study their testimony in this case carefully, will be convinced of their ability and equipment for the work.

Dr. Quaife, after the death of Reuben Gold Thwaites, and since the taking of testimony in this case, became Dr. Thwaites' successor as superintendent and secretary of the Wisconsin State Historical Society, a position which he now holds. He edited the four volume *Diary of President Polk*, wrote a monograph on the "Doctrine of Nonintervention of Slavery in the Territories," contributed articles to the *Cyclopedia of American Government*, edited by Professor McLaughlin and Albert Bushnell Hart, and at the time of testifying, and for several months prior thereto, had been engaged in pre-

paring a history of Fort Dearborn and early Chicago, for which the Chicago Historical Society placed at his disposal a large mass of material connected with the early history of Chicago, which had been reserved by it for this work and had not been accessible to scholars generally. In connection with that study he acquired a large knowledge of the early history of Chicago and the surrounding region, and he was familiar with a large majority of the authorities referred to by the Government's witnesses before his attention was called to this case. Since testifying, he has produced the work on which he was then engaged "Chicago and the Old Northwest," which is a standard and authoritative work.

It is unnecessary to burden the court with the details of Dr. Quaife's testimony. He pointed out that certain translations used by Alvord were incorrect, or wholly omitted important passages. He also, in connection with the narratives and publications used by Alvord, pointed out numerous statements contained in them, parts of them vital to the issue, which Alvord had not mentioned. The character of his work was also indicated by his demonstration that Ogden's Letters, to which Dr. Thwaites gave authority by including them in his "Early Western Travels," were almost entirely plagiarisms, and that Ogden never made the journeys he described. These are but instances to show the character of Dr. Quaife's work.

The testimony of Mr. Lee, called by the defendant, was particularly devoted to showing the history of the development of trade and settlement in Chicago and the Illinois country, with a view to demonstrating that those conditions made the conclusions of the Government's expert witnesses impossible of acceptance. Without reference to this case, and before his attention was called to it, he had written a work entitled "Transportation as a

actor in the Development of Illinois." One of the conclusions to which he came in that work, was that Chicago was a stimulus for the development of but a small area of Illinois prior to 1850, due to the fact that connections between it and the interior were not sufficient to make development possible. The work treated, among other things, of the question of transportation in upper Illinois prior to 1860. All this was done, and his conclusions arrived at, without reference to this litigation. Counsel for the Economy Light & Power Company were referred to this paper by Dr. Jameson, head of the Educational Department of the Carnegie Institute at Washington, and this resulted in his appearance as a witness for appellant. (Abst., 1090-1093.) Mr. Lee furnished much evidence as to the course and amount of the fur trade, and the conditions as to population and trade during the periods in question.

There was introduced a mass of publications, gazeteers and compilations intended to show that the Chicago, DesPlaines and Illinois constitute a route of travel. They have to do with primitive times, and for the most part were demonstrated to have been written by persons who were never in the vicinity of the river. Statements by such persons were copied by other writers and these latter were introduced as though they were original sources. The most that can be said for this class of evidence is that it shows that in early days there was a Lake Michigan-Illinois River route, of which at times of flood, and under precarious conditions, parts of the DesPlaines were at times used by small boats in presettlement days, but none showed it to be navigable for purpose of useful commerce.

POINT XVIII.

THE EFFECT OF THE DECISION THAT THE DESPLAINES RIVER IS NAVIGABLE IS NOT CONFINED TO APPELLANT. IF AFFIRMED IT WILL NOT ONLY SERIOUSLY AFFECT VAST PRIVATE INTERESTS, BUT THE RIGHT TO MAINTAIN VERY IMPORTANT EXISTING STRUCTURES, NECESSARY FOR THE CONVENIENCE OF THE PUBLIC.

It is proper to call the court's attention to the far-reaching consequences which must logically follow from the decision of lower courts, if they shall be affirmed. The effect of the judgment appealed from will not be merely that the Economy Light & Power Company may not complete its dam at Dresden Heights. If the Des Plaines is a navigable stream, then the United States has the power to, and if it ever improves the river it must, cause the destruction or modification of thirteen permanent steel bridges between Lockport and the mouth of the river, some of which are the important highway bridges between different parts of Joliet, and two of which are great railroad bridges, all without compensation to the owners, and all to the great inconvenience of the public. It will also have the power to cause the removal of a costly power dam at Joliet, belonging to the State. No permit of the United States was ever asked or obtained for any of these structures. The history of the river justified the builders of them in believing that they had as unqualified a right to build in the bed of this stream as they would have had on any upland held in fee, respecting only the rights of other owners above and below them. This is true, (1) because not only was there no commerce on the river, but there had never been any upon it from the time of the earliest settlement upon its banks, and (2) because the United States had from the earliest days officially classified it as an unnavigable stream. In this proceeding there is, therefore, involved the right

of the United States to require the removal of all structures by riparian owners, by municipalities and by the State, all of which were permitted to be built by the United States, upon an accepted classification of the river, which has been rejected by the lower courts. And this not in the interest of navigation, for restraining the erection of this dam would have no effect on navigation. The existing obstructions absolutely preclude the possibility of such navigation, even if the stream were otherwise capable of it, which it is not.

CONCLUSION.

Regardless of the ultimate result of this litigation, a great and irrecoverable loss has been sustained by appellant because of the actions brought against it by the State and the United States. It has not only lost the use of its investment, but also the profit which would have arisen from the production of power. But the loss is not alone appellant's. For more than ten years, because of this litigation, power of great value to the public, has literally gone to waste. The work which it would have done, has been done by the needless use of coal and other fuel supplies. And while this waste has been going on, expert witnesses have been solemnly engaged for months in preparing figures, maps and other testimony to establish theoretically by laboratory methods, that a stream whose low water discharge "could be taken through a six-inch pipe," was a navigable waterway of the United States. Possibly the most exhaustive study ever given to historical sources concerning any one small field, has been devoted to an effort to prove, by historical experts, that more than a century ago adventurers and explorers somehow managed to get from Chicago to the Illinois River, and that at times when for brief periods in spring and fall, the DesPlaines River was swollen out

of its banks, they were able, with their canoes, to make some precarious use of the DesPlaines River. And while the engineers figured, and the historians drew deductions, the river rushed on, unnavigated and unnavigable. If the decision below is affirmed, the waste and loss of the last ten years will continue indefinitely. Judging the future by the past, and giving just weight to existing conditions, it is probable that the communities which could be served by this power, will, in the language of the court in *Valentine v. Berrien Springs Water Co., supra*, "lose the greatest benefits which nature has placed within their reach," for years to come, if not for all time, because of a decree which protects no interest, and benefits no one. If the river ever is made capable of navigation appellant's dam, according to the War Department engineers, will be an aid, and not a hindrance, to the enterprise.

We submit that in the light of this record, the decree should be reversed.

Respectfully submitted,

FRANK H. SCOTT,
Attorney for Appellant.

AFFIDAVIT AS TO AMOUNT IN CONTROVERSY.

United States } ss.
of America. }

THE SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1919.

Economy Light & Power Company,
Appellant, }
vs. } No. 365.
The United States of America,
Appellee. }

United States of America, } ss.
State of Illinois, }
County of Cook. }

CHARLES A. MUNROE, being duly sworn, upon oath, deposes and says, that he is president of the appellant and is personally acquainted with the facts hereinafter stated; that the above entitled cause involves the right of appellant to construct and maintain a dam in the DesPlaines River in the State of Illinois; that the matter in controversy exceeds one thousand dollars (\$1,000) besides costs; that said dam has been partially constructed by appellant; that by the decree of the District Court appellant is enjoined from any further construction of said dam and from maintaining said dam in said river, and is required to remove so much of said dam as has been already constructed; that appellant has expended to date in the construction of said dam upwards of two hundred thousand dollars (\$200,000); that it has issued bonds to the amount of two million dollars (\$2,000,000) and has sold the same for the purpose of procuring money to pay for the construction of said dam; that said bonds are secured upon said dam as

built and as to be built and upon the power site in connection with said dam; and that the value of the right to maintain said dam is far in excess of one thousand dollars (\$1,000).

And further affiant sayeth not.

(Signed) CHARLES F. MUNROE.

Subscribed and sworn to before me this 10th day of March, A. D. 1920.

(Signed) LELAND K. NEEVES,

(SEAL)

*Notary Public,
Cook County, Ill.*

STIPULATION AS TO AMOUNT IN CONTROVERSY.

United States }
of America. } ss.

THE SUPREME COURT OF THE UNITED STATES,

October Term, A. D. 1919.

Economy Light & Power Company,	} No. 365.
<i>Appellant,</i>	
<i>vs.</i>	
The United States of America,	
<i>Appellee.</i>	

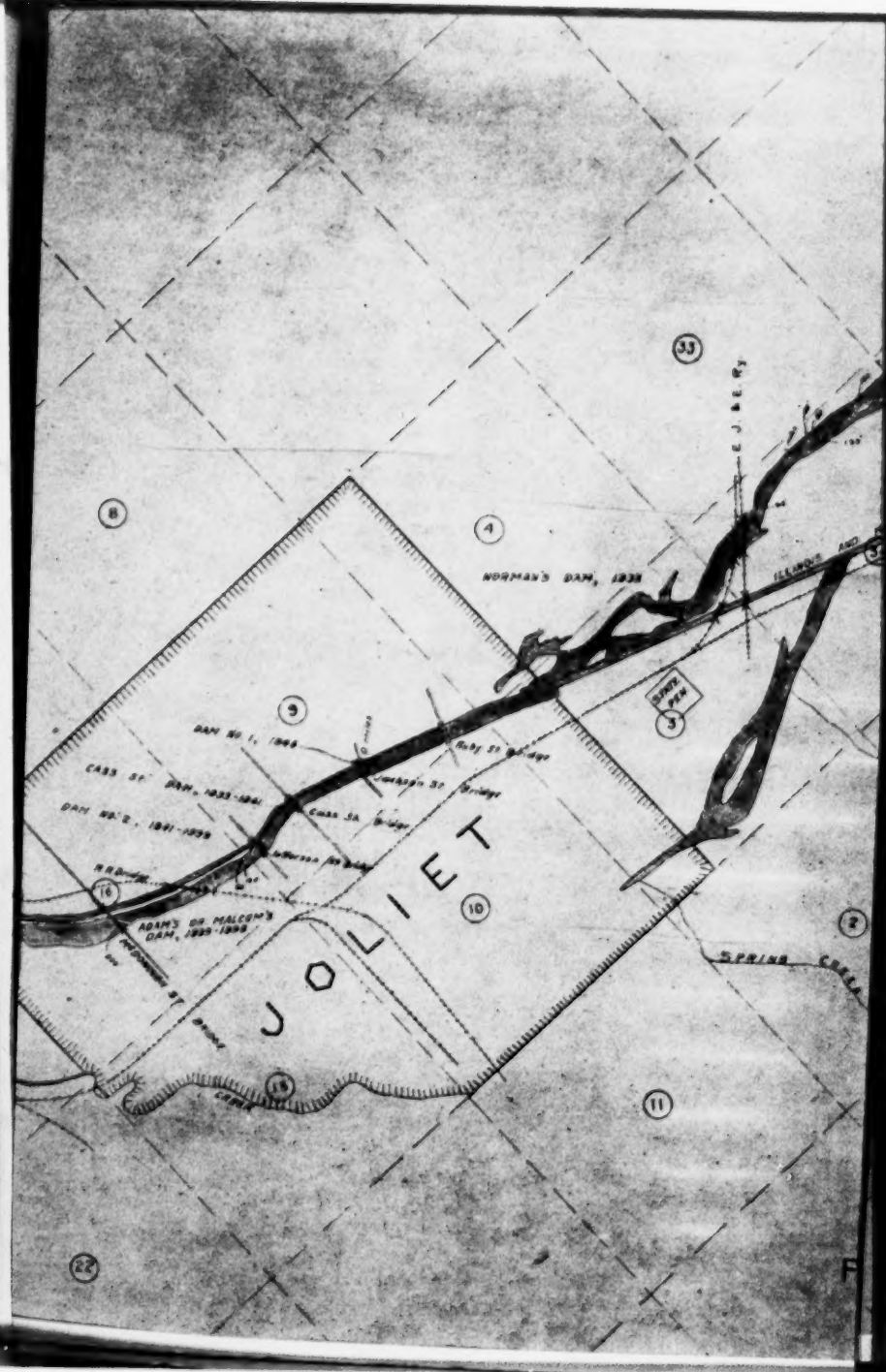
STIPULATION.

It is hereby stipulated by and between the parties hereto by their respective solicitors, that the matter in controversy in the above entitled cause exceeds one thousand dollars (\$1,000) besides costs and exclusive of all costs and interest; and that this stipulation and the affidavit of Charles A. Munroe dated March 10, 1920, to the effect that the matter in controversy herein exceeds one thousand dollars (\$1,000) besides costs and exclusive of all costs and interest, may be filed with the clerk of this court, and made a part of the record in said cause.

Dated March 12, 1920.

(Signed) FRANK H. SCOTT,
Solicitor for Appellant.

(Signed) ALEX. C. KING, JR.,
*Solicitor for the United States
of America, Appellee.*



MAP OF DESPLAINES RIVER FROM LOCKPORT TO THE MOUTH

Drawn by W.F. Miller under the direction of

J.W. WOERMANN, C.E.

